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ABSTRACT

This Congressional hearing transcript presents testimony on how to best combat the risk of copyright infringement facing content providers on the Internet. The Internet enables users to reproduce perfectly and distribute globally copies of the digital works that represent some of the most valuable products of American creativity. While some of these digital transmissions are legal, many others are not. The challenge is to balance copyright protection to encourage and reward creativity, while promoting accessibility to information. These hearings address the concerns raised by online service providers regarding their potential liability for copyright infringement whey they are involved in making available copyrighted material. Testimony is presented by: Fritz E. Attaway (Motion Picture Association of America); Cary H. Sherman (Recording Industry Association of America); Daniel Burton (Novell, on behalf of the Business Software Alliance and the Software Publishers Association); George Vradenburg, III (American Online, Inc., on behalf of the Ad Hoc Copyright Coalition); Roy Neel (United States Telephone Association); and Robert L. Oakley (Georgetown University Law Center, on behalf of the American Association of Law Libraries). The appendix includes the text of the proposed legislation, and responses of witnesses Attaway, Sherman, Burton, Vradenburg, and Oakley to questions from Senators. A prepared statement on behalf of the Graphic Artists Guild by Daniel Abraham is provided as an additional submission for the record. (SWC)

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S. Hrg. 105–366

THE COPYRIGHT INFRINGEMENT LIABILITY OF ONLINE AND INTERNET SERVICE PROVIDERS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

ON

S. 1146

A BILL TO AMEND TITLE 17, UNITED STATES CODE, TO PROVIDE LIMITATIONS ON COPYRIGHT LIABILITY RELATING TO MATERIAL ONLINE, AND FOR OTHER PURPOSES

SEPTEMBER 4, 1997

Serial No. J–105–44

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THE COPYRIGHT INFRINGEMENT LIABILITY OF ONLINE AND INTERNET SERVICE PROVIDERS

THURSDAY, SEPTEMBER 4, 1997

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:08 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Grassley, Kyl, Ashcroft, Abraham, and Leahy.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. I am happy to welcome you all out to our hearing this morning. The purpose of our hearing today is to hear testimony on how we can best combat the risk of copyright infringement facing content providers on the Internet. Now, this may seem to be a very obscure issue to some, but depending on your perspective, an improper resolution of this issue may either stunt the growth of the Internet or facilitate the piracy of copyrighted works. So those seem to be the two broad issues.

By means of digital technology, the Internet enables users to reproduce perfectly and to distribute globally, and almost instantaneously, copies of the digital works that represent some of the most valuable products of American creativity. While some of these digital transmissions are legal, many others are not. Unless this illegal activity is eliminated or at least substantially minimized, American creators and businesses will be denied the reward for their labors which is an indispensable incentive to continue the level of creativity and entrepreneurship that the United States currently enjoys.

Even if one does not care about movies, music, literature, art, news, or software, the fact remains that copyright is a major component of the American economy. Total copyright industries represent nearly 6 percent of the U.S. gross domestic product, adding close to $400 billion to the U.S. economy in 1994. These same industries employ approximately 5 percent of the U.S. workforce, and they are creating new jobs at twice the rate of the U.S. economy as a whole. Yet, according to the copyright industries, American companies lose $18 to $20 billion every year due to international piracy of copyrighted works.

But the copyright owners, the content providers, are not anti-Internet. To the contrary, content providers are an increasingly healthy and vital component of our information technology industry. Content providers appreciate and will profit from the opportunity that the Internet provides to distribute their products, provided, however, that they can be sure the Internet will not recklessly facilitate infringement. They say they would use it more if they felt less vulnerable.

Similarly, those who provide the Internet or services on the Internet to service providers are not anticopyright. But under existing case law, the argument can be made that service providers may be held liable for the infringing acts of others, acts that the service providers are not aware of and cannot be aware of in the ordinary course of their activities.

For example, it might be said that a service provider would be held liable for the unauthorized posting of copyrighted photographs on a Web site or electronic bulletin board residing on the service provider's network, regardless of whether the service provider knew of the posting or exercised any sort of control over the content of the site. In short, the question is whether consumers will be able to tap into the Internet's full potential and whether companies will continue to invest billions in this industry if massive copyright infringement liability is a reality.

Consider the growth of the Internet. From the inception in the 1960's, the Internet has grown from a relatively small connecting Defense contractors, universities and the Pentagon to what has now become a global infrastructure connecting countless independent networks representing more than 1.3 million domains, with more than 19.5 million host computers in more than 200 countries.

In the past few years alone, the Internet has more than tripled in size. According to a recently released Nielsen Media Research study, nearly one in every four people in the United States and Canada over the age of 16 are on the Internet. This represents some 50 million users in the United States and Canada alone, more than double the number just 18 months ago. Do we want this growth to be retarded by a series of adverse court rulings or because content providers are reluctant to make full use of the Internet? But is our technology horizon far enough away to be able to intelligently legislate for the future? Will technology itself solve some of the problems that have arisen?

These are just a few of the basic questions that illustrate the difficulties posed by the opening of the information highway. Others will be raised in the course of this hearing, and maybe when we are done the outlines of a solution may be dimly perceived. I hope more than dimly perceived, but I am not counting on a lot. [Laughter.]

Senator LEAHY. Let there be light.

The CHAIRMAN. Yes, let there be light.

I have not introduced legislation on service provider liability because it is not clear to me at this time what the solution is. Senator Ashcroft, Congressman Coble, Congressman Goodlatte, and Commissioner Lehman have all made proposals. As far as I know, the content providers and the service providers have not agreed on any of these proposals.

Now, I am clear about one thing, however, and that is that I have an open mind on this issue and will keep an open mind on this issue. I want to work with both sides to arrive at a mutually acceptable solution. It is my hope that at the very least we can begin a productive dialog wherein innovative solutions are considered and agreed to so that an appropriate balance can be struck among the property interests of content providers, the desire for a predictable and fair liability scheme for service providers, and the public's desire and need to access information. Such a balanced solution will ensure the vigorous operation and expansion of the Internet.

So I am really happy to have you witnesses here today to testify about this. You are experts in your fields, and I have met with all of you and will appreciate listening to what your suggested solutions are in these areas. I am hopeful that we can come to some meeting of the minds where we can pass legislation that would basically be acceptable to all concerned.

We will now turn to my distinguished colleague from Vermont, the ranking Member of this committee, who works very hard in this area and for whom I have a great deal of respect in this area.

Senator Leahy.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman, and I appreciate the fact that we are having this hearing. So people will understand some of my views—and I will be in and out of the hearing because of the involvement with the land mines meeting in Oslo that is ongoing, but we have the successful adoption by the World Intellectual Property Organization of two new copyright treaties in Geneva last December, and that was good news to people in this country, and actually around the world.

The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, I think, will help protect intellectual property rights. I think they can help American creators and copyright-based companies whose copyrighted materials are subject to infringement, especially online.

Over the past several months, I have spoken and I have written to Secretary Daley and urged him to transmit without delay the Administration's proposal for implementing legislation. That is where we get into the real details. I was pleased when the Administration did so in July, and Senator Hatch and I, joined by Senators Thompson and Kohl, were able to introduce that legislation on behalf of the Administration on July 31. It is pending before us, S. 1121. I think it is an excellent start, and I commend the Administration, the Vice President, Secretary Daley, and Assistant Secretary Bruce Lehman for getting that here. We need to proceed promptly to deliberation of these important matters. It is something that we ought to wrap up before the Congress goes home this year because of the significance of it.

Technological developments are leading to, we all know, important advancements and accessibility and affordability of art, literature, music, film, and information services for Americans and people all over the world. Vinton Cerf, the co-inventor of the computer networking protocol for the Internet, recently stated in the New York Times, "The Internet is now perhaps the most global and democratic form of communications."

When I get notes from friends all over the world who send me something that they picked up either from our press or an article or something like that and they just sit down and click and I am sitting in my farm house in Vermont or my office here in Washington and just get these notes and answers, you suddenly realize that this is something that goes across all barriers.

We see opportunities to break through those barriers that faced those of us who live in rural areas, for example, inaccessibility for a number of things in rural areas, or people with physical disabilities; you can use all kinds of examples. So we help democratic ideals when we make more information and more services available.

But you have got to properly balance copyright protection to encourage and reward creativity, and promote accessibility, and that is the challenge. Copyright has been the engine that has traditionally converted the energy of artistic creativity into publicly available arts and entertainment. Historically, the Government's role has been to encourage creativity and innovation, and doing that by protecting copyrights that create incentives.

I think of the Digital Performance Right in Sound Recording Act, and I was pleased to work with that and with Senator Hatch to pass that legislation—in many ways, the precursor to the WIPO treaty. I have been supportive of copyright protection, encryption, and anticircumvention legislation over the past several years. I have been trying to find ways to utilize copyright management information to protect and inform consumers.

Today's hearings will focus on concerns raised by online service and Internet service providers regarding their potential liability for copyright infringement when they are involved in making available copyrighted material. Neither the treaties nor the implementing legislation specifically addresses the liability of these commercial entities for their participation in infringing activities. In this area, as in others in which competing economic interests are implicated, I have urged the parties to come together and reconcile their differences as best they can.

This is something where we can mandate something, but it would be far more helpful if some of the conflicting interests could join together. Nobody is going to get every single thing they want, but we want to have as much available online as possible. We want to make it possible for online providers to continue this explosion of material that is there, but we also know that we are not going to have the creators and the artists and those whose genius make the material available in the first place—they are not going to be there if they are unable to at least be rewarded for what they have done.

So we have an interesting balance. I don't think it is an insurmountable problem, but it is a new challenge created by a technology that is still evolving. I see Mr. Attaway here and others. I am sure they think about what it is going to be like when everything is on digital, from movies to music, and when we are doing, as Mr. Neel knows well, the ability to transmit data at a much faster rate than we do today. Computers will change, technology will change, and the delivery systems will improve, and then we have got a real problem and it is better that we address it today than after the fact.

So, Mr. Chairman, we are prepared to work with you in any way we can.

The CHAIRMAN. Thank you, Senator Leahy.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR PATRICK J. LEAHY

The successful adoption by the World Intellectual Property Organization (WIPO) of two new copyright treaties in Geneva last December was appropriately lauded in the United States and around the world. The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty will help protect intellectual property rights and stand to benefit important American creators and copyright-based companies whose copyrighted materials are subject to piracy and infringement online.

According to Commerce Secretary Daley, "the treaties largely incorporate intellectual property norms that are already part of U.S. law." What these treaties will do is give American owners of copyrighted material important tools to protect their intellectual property in those countries that become a party to the treaties. With an ever-expanding global marketplace, such international protection is critical to protect American creators and companies and, ultimately, American jobs and the U.S. economy.

Over the past several months, I have spoken and written to Secretary Daley urging him to transmit without delay the Administration's proposal for implementing legislation. I was very pleased when the Administration did so in July and that Senator Hatch and I, joined by Senators Thompson and Kohl, were able to introduce that legislation on behalf of the Administration on July 31. The legislative package now pending before us, S. 1121, is an excellent start for moving forward, and I commend the Administration, Vice President Gore, Secretary Daley and, in particular, Assistant Secretary Bruce Lehman for their hard work on these important treaties and its implementing legislation.

I hope we will proceed promptly to deliberation on those important matters. That bill would conform our copyright laws to two new treaty obligations. Specifically, the treaties obligate the signatories to provide legal protections against circumvention of technological measures used by copyright owners to protect their works, and against violations of the integrity of copyright management information which identifies a work, its author, the copyright owner and any information about the terms and conditions of use of the work.

Technological developments, such as the development of the Internet and remote computer information data bases, are leading to important advancements in accessibility and affordability of art, literature, music, film and information and services for Americans and people all over the world. As Vinton Cerf, the co-inventor of the computer networking protocol for the Internet, recently stated in The New York Times: "The Internet is now perhaps the most global and democratic form of communications. No other medium can so easily render outdated our traditional distinctions among localities, regions and nations."

We see opportunities to break through barriers previously facing those living in rural settings and those with physical disabilities. Democratic values can be served by making more information and services available.

Properly balancing copyright protection to encourage and reward creativity, while promoting accessibility is our challenge. Ours is a time of unprecedented challenge to copyright protection. Copyright has been the engine that has traditionally converted the energy of artistic creativity into publicly available arts and entertainment. Historically, the government's role has been to encourage creativity and innovation by protecting copyrights that create incentives for the dissemination to the public of new works and forms of expression. That is the tradition which I intend to continue.

I was glad to have played a role in the development and enactment of The Digital Performance Right in Sound Recording Act, Public Law No. 104–39. That legislation served in many respects as the precursor to the WIPO treaty on performance rights adopted last December. Performance rights for sound recordings is an issue that has been in dispute for over 20 years. I was delighted in 1995 when, with Senator Hatch's leadership, we were finally able to enact a U.S. law establishing that right.

I believe that musicians, singers and featured performers on recordings ought to be compensated like other creative artists for the public performances of works that they create and that we all enjoy. I wanted companies that export American music not to be disadvantaged internationally by the lack of U.S. recognition of such a performance right. Most of all, I wanted to be sure that our laws be fair to all parties—to performers, musicians, songwriters, music publishers, performing rights societies, emerging companies expanding new technologies and consumers and the public.

I have also been supportive of copyright protection, encryption and anticircumvention legislation over the past several years and been working on ways to utilize copyright management information to protect and inform consumers.

Today's hearing will focus on concerns raised by online service and Internet service providers (OSP/ISPs) regarding their potential liability for copyright infringement when they are involved in making available copyrighted material. Neither the treaties nor the implementing legislation specifically address the liability of these commercial entities for their participation in infringing activities. In this area as in others in which competing economic interests are implicated, I have urged the parties to come together and reconcile their differences as best they can.

In addition to pressing forward on WIPO implementing legislation, another significant intellectual property issue that was raised last year in Geneva but left unresolved was the question of the scope of legal protection accorded data bases. Recognizing the importance of this issue to creators and users of data bases, Chairman Hatch earlier this year asked the Copyright Office to conduct a study on protection of data bases. Late last month, I understand, the Copyright Office issued a detailed report on the subject of legal protection for data bases. This is an issue of both domestic and international importance and also needs careful review by Congress. It is yet another area in which we will be called upon to balance protection for the substantial investments of data base creators against unauthorized copying and dissemination with our interests in encouraging access to information for American consumers, including our scholars, educators, researchers and scientists.

I join the Chairman in welcoming the witnesses today and look forward to hearing from them.

The CHAIRMAN. We are pleased to have a distinguished panel of witnesses with us today who represent the major industries and interests affected by the issues we will be discussing throughout the course of this debate. Naturally, we are going to look forward to hearing from each of you and hearing what you have to say on these matters.

Our first witness will be Mr. Fritz Attaway, who is the senior vice president for government relations and Washington general counsel to the Motion Picture Association of America. Mr. Attaway first joined the Motion Picture Association more than 20 years ago and has long been active in copyright and international trade issues in both the Government and the private sector. I have been privileged to work with Fritz and the Motion Picture Association over the years and I look forward to your testimony today.

Following Mr. Attaway's testimony, we will be pleased to hear from Mr. Cary Sherman, who was appointed senior executive vice president and general counsel to the Recording Industry Association of America earlier this year. Prior to joining the Recording Industry Association, Mr. Sherman was a senior partner at the Washington, DC, law firm of Arnold & Porter, where he headed the firm's intellectual property and technology practice group. So we are really pleased to have you with us here today and look forward to your testimony.

We will then hear from Mr. Dan Burton, from my home State of Utah, who is vice president for Government Relations at Novell, Inc., based in Orem, UT. Novell is the world's leading network software provider. Mr. Burton joined Novell in 1995. Prior to that, he served as president of the Private Sector Council on Competitiveness. He is a member of the Council on Foreign Relations, the chairman of the Government Affairs Committee of the Software Publishers Association, and former chairman of the Public Policy Council of the Business Software Alliance. So we welcome you, Dan, and look forward to your testimony.

We will next hear from Mr. George Vradenburg, who was named this year as senior vice president and general counsel to America Online, Inc. Prior to joining AOL, he was a partner in the Los Angeles law office of Latham and Watkins, where he co-chaired the firm's entertainment, sports, media industry practice group. He was also senior vice president and general counsel with CBS and executive vice president at Fox. Mr. Vradenburg will be testifying on behalf of the Ad Hoc Copyright Coalition, which represents more than 1,400 Internet service providers, content providers, and telephone companies. So we welcome you, Mr. Vradenburg, and look forward to your testimony.

After Mr. Vradenburg, we will turn to Mr. Roy Neel, who is the president and chief executive officer of the United States Telephone Association, USTA. USTA is the primary trade association of local telephone companies representing more than 1,100 telephone companies. Prior to joining the USTA, Mr. Neel served as deputy chief of staff to President Clinton and was an aide to Vice President Gore during his entire 16-year tenure in both the House and the Senate, serving as his chief of staff for the 6 years leading up to his election to the Vice Presidency. So we are happy to have you here, Roy, and look forward to hearing you.

Finally, we will be pleased to hear from Professor Robert Oakley, who will testify on behalf of the American Association of Law Libraries and 17 other prominent educational and library associations. For the past 14 years, Professor Oakley has been the director of the law library and professor of law at the Georgetown University Law Center. He has been an active member of the American Association of Law Libraries for nearly a decade. So we surely look forward to your important testimony today on behalf of the educational and library communities.

So let us turn to you, Mr. Attaway, and we will be——

Senator LEAHY. Mr. Chairman, I am glad to see Georgetown Law School represented. I just happen to mention that for no particular reason other than having graduated from there.

The CHAIRMAN. Well, don't anybody hold that against Georgetown is all I can say. I know it is a fine school.

Senator LEAHY. Yes, thank you very much, for those of us who love it, to quote another New Englander.

The CHAIRMAN. Now, we are going to limit you to 5 minutes because we do have a potential problem. There may be an objection to meeting after the 2 hours and they may invoke that rule. If that is so, we only have an hour to hold this hearing, and I would like to hold it in an hour anyway. [Laughter.]

So if you can limit yourselves to 5 minutes. I know you do have a slide presentation and it may take a little bit longer. We will allow for that, but if you can, we would be very appreciate. So when you see that red light go on, I hope you will stop or just sum up in a few seconds.

PANEL CONSISTING OF FRITZ E. ATTAWAY, SENIOR VICE PRESIDENT, GOVERNMENT RELATIONS, AND WASHINGTON GENERAL COUNSEL, MOTION PICTURE ASSOCIATION OF AMERICA, WASHINGTON, DC; CARY H. SHERMAN, SENIOR EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, RECORDING INDUSTRY ASSOCIATION OF AMERICA, WASHINGTON, DC; DANIEL BURTON, VICE PRESIDENT, NOVELL, OREM, UTAH, ON BEHALF OF THE BUSINESS SOFTWARE ALLIANCE AND THE SOFTWARE PUBLISHERS ASSOCIATION; GEORGE VRADENBURG, III, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, AMERICA ONLINE, INC., DULLES, VA, ON BEHALF OF THE AD HOC COPYRIGHT COALITION; ROY NEEL, PRESIDENT AND CHIEF EXECUTIVE OFFICER, UNITED STATES TELEPHONE ASSOCIATION, WASHINGTON, DC; AND ROBERT L. OAKLEY, DIRECTOR OF THE LAW LIBRARY AND PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC, ON BEHALF OF THE AMERICAN ASSOCIATION OF LAW LIBRARIES

STATEMENT OF FRITZ E. ATTAWAY

Mr. ATTAWAY. Thank you for giving me the opportunity to be here today. Ordinarily, this seat would be taken by Jack Valenti. Unfortunately, he had to represent the U.S. film industry at film festivals in Italy and France.

Senator LEAHY. Poor baby.

The CHAIRMAN. It sounds like hard duty. [Laughter.]

Senator LEAHY. The chairman and I will send him a condolence note right away.

Mr. ATTAWAY. I was going to say I am sure that you all share with me deep sympathy for the sacrifices he is making on behalf of the country.

The CHAIRMAN. We have noticed those sacrifices over the years.

Mr. ATTAWAY. The issues that we are here to discuss today have been the subject of a great deal of talk recently. I hope that today we can help you separate the facts from some of the speculation that you have heard.

Mr. Chairman, you have already mentioned the importance of the copyright industries to the economy, to the United States, both in terms of export revenues and gross domestic product and jobs. The copyright industries generally, and the motion picture industry specifically, are very excited about the explosive growth of the Internet and other forms of digital distribution for copyrighted works. We know that this new technology will allow us to reach more markets faster, with greater diversity of products, and the American consumer and consumers around the world will have easy access to more entertainment choices than ever before.

But it is also no secret that our excitement about these new frontiers is tinged with anxiety. The very same technology that facilities the legitimate distribution of our creative products around the world can also be used to facilitate copyright piracy.

Internet piracy is not a "maybe" problem or a "could be" problem or a "someday" problem. It is a problem, a very serious one, here and now, today. Today, Internet piracy focuses on computer programs, video games and, increasingly, recorded music. Movies and videos are not much in evidence yet. That is because the audio-visual content is so rich in information that it cannot yet move easily through the digital network. The volume of flow is simply too great for some of the pipes. But we also know that our present reprieve is only temporary. The same technology that will smooth the way for legitimate delivery of video on demand over digital networks will also prime the pump for copyright pirates.

MPAA is very familiar with video pirate marketplaces. In China, in Russia, in Italy, in scores of other countries around the world, video pirates steal more than $2 billion of our intellectual property each and every year. We know that the next battleground will be in cyberspace, a virtual pirate bazaar that, in scope, volume and agility of operation, may dwarf those that we are fighting today.

Today, the pirate who obtains by stealth or malfeasance a copy of the latest blockbuster picture must cope with formidable distribution problems. Physical copies must be smuggled across borders, duplicated, warehoused, and parceled out to distributors before reaching the ultimate consumer. Digital networks will soon make this complex and dangerous undertaking cheap and simple.

It will be technically possible for the pirated master to be digitized, posted on the Web, and made available to Net surfers around the world. It will also be possible to download the master over the Internet to a digital video recorder half a world away, and that can churn out thousands of pristine, perfect copies at the touch of a button for immediate distribution to customers. This is the context in which this committee should take a long, hard look at the question of online service liability.

Most of the millions of OSP and ISP customers are law-abiding and ethical, but OSP's and ISP's can also be a critical link in the chain of Internet piracy. OSP's and other telecommunications companies must shoulder their fair share of this burden. Of course, we as copyright owners must take the lead, but the cooperation of service providers is essential.

Our copyright law must provide the right incentives to stimulate that cooperation. Accountability under appropriate circumstances for copyright violations committed by network users is one of the legal incentives provided under the copyright law.

Some service providers have painted a nightmare scenario of their future. Unless the copyright law is changed to immunize them, they foresee a flood of liability and litigation. This committee must cast a cold eye on those predictions. They fly in the face of experience of the first few years of the Internet revolution. The feared flood of infringement litigation has never materialized. In fact, it is remarkable how few lawsuits have been brought against OSPs and ISPs.

The growth rates of the business of providing access to the Internet are astronomical. The Interactive Services Association estimates that revenues from providing Internet access nearly quadrupled between 1995 and 1997. Over the same time span, the number of households in North America with online service more than doubled. The subscriber base of the single leading OSP alone, American Online, just reached 9 million, 3 times the total of just 2 years earlier. The forward velocity of Internet growth is approaching warp speed, and if, as some telecommunications companies claim, the copyright liability issue is a drag on that momentum, mere mortals have been unable to detect it.

You may hear the argument that giving service providers full or partial immunity from copyright infringement liability is something the United States must, or at least should do in order to implement the two new treaties negotiated last year at the World Intellectual Property Organization. You should reject these arguments because they are manifestly untrue.

Ratifying and implementing the treaties is a top priority for the United States. If online service provider liability is injected into this mix, the level of complexity and controversy will make a quantum leap. Any hope of rapid U.S. implementation of the treaties within the 1-year timeframe set by President Clinton will be dashed, and with it the position of leadership on global copyright policy.

Mr. Chairman, the facts before us include no hard evidence that existing copyright law is imposing unreasonable or debilitating liability on OSPs or ISPs. There is hard, confirmable evidence that my industry alone is losing over $2 billion to pirates each and every year, and that piracy in the digital world will become even more costly. I respectfully urge you to act on the basis of facts, not speculation. If you do, you will act to strengthen the copyright law, not to weaken it.

Thank you very much.

The CHAIRMAN. Thank you.

[The prepared statement of Mr. Attaway follows:]

PREPARED STATEMENT OF FRITZ E. ATTAWAY

Chairman Hatch, members of the Committee, my name is Fritz Attaway and I am Senior Vice President and Washington General Counsel of the Motion Picture Association of America. I am pleased that this Committee is taking a preliminary look at the liability issues associated with copyright infringements that occur online. These issues deserve a long hard look *before* considering any proposals to change the copyright law in this area.

This Committee is particularly well situated to give this issue the long hard look that is required. I know you realize how important the creative industries are to this country's economy and our nation's position in global trade. You fully appreciate that the industries that depend on copyright—such as publishing, software, videogames, music and recordings, as well as the motion picture industry—contribute a quarter-trillion dollars each year to the U.S. Gross Domestic Product. You also understand about the three million American jobs that are directly dependent on these industries, and about an equal number that are generated indirectly. You also know that these industries account for over $50 billion in exports and foreign sales each year, creating an enormous plus in our nation's trade ledgers.

The copyright industries generally, and the motion picture industry specifically, are excited about the explosive growth of the Internet and other forms of digital distribution of copyrighted works. We know that this new technology will allow us to reach more markets faster, with a greater diversity of products, and with less expense and hassle. In the long run—and, very probably, sooner than we think—digital networks could be an incredible bonanza for the American consumer, and for consumers around the world, who will have easy access to more entertainment choices than ever before.

But it is no secret that our excitement about these new frontiers is tinged with anxiety. The very same technology that facilitates the legitimate distribution of our creative products around the world also can be used to facilitate copyright piracy. The theft of the intellectual property that is the basis for the great economic and cultural success story that our industry represents.

Internet piracy is not a "maybe" problem, a "could be" problem, a "might someday be" problem. It is a problem—a serious one—here and now. In odd corners of the World Wide Web, in linked sites based in Europe, Asia and Australia as well as the

U.S., a pirate bazaar is underway. Its customers span the globe, wherever the Internet reaches, and its wares are the fruits of American creativity and ingenuity.

Today, Internet piracy focuses on computer programs, videogames, and, increasingly, recorded music. Movies and videos are not much in evidence—yet. That's because our audio-visual content is so rich in information that it can't yet move easily everywhere in the digital network—the volume of flow is too great for some of the pipes. We know that the reprieve is temporary, however. The same technology that will smooth the way for legitimate delivery of video on demand over digital networks will also prime the pump for copyright pirates.

MPAA is very familiar with the great video pirate marketplaces of today. In China, in Russia, in Italy, in scores of other countries, video pirates steal more than $2 billion of our intellectual property each year. By spending millions of dollars on anti-piracy campaigns, and with the invaluable help of Congress and of the Executive Branch, we're making great progress in the fight against these physical pirate bazaars. But we know that the next battleground will be in cyberspace: a virtual pirate bazaar that—in scope, volume and agility of operation—may dwarf those we are fighting today.

The Internet will be the crucial link in the pirate operations of tomorrow. Today, the pirate who obtains, by stealth or malfeasance, a copy of the latest blockbuster picture before it is even released in the theaters must cope with formidable distribution problems. Physical copies must be smuggled across borders, duplicated, warehoused and parceled out to distributors before reaching the ultimate consumer. Digital networks will soon make this complex and dangerous undertaking cheap and simple. It will be technically possible for the pirate master to be digitized, posted on the Web, and made available to Net surfers all over the world. It will also be possible to download the master over the Internet to a digital video recorder half a world away, that can churn out thousands of pristine, perfect copies at the touch of a button, for immediate distribution to customers. By the time those pirate digital copies hit the street, the pirate web site will have disappeared, to be set up anew tomorrow in a different country, where a different current hit will be available.

This is the context in which this Committee should take its long, hard look at the question of online service provider (OSP) liability. Let's be clear right up front: most of the millions of customers of OSPs and Internet service providers (ISPs) are law-abiding and ethical. They use these services to reach the "Net for perfectly legitimate purposes: to communicate by electronic mail; to participate in online communities of shared interests; to access news and information; and to reach the mushrooming number of legitimate, authorized sites that offer entertainment, including sites affiliated with all of our studios. But at the same time, OSPs and ISPs can also be a critical link in the chain of Internet piracy. None of the piracy scenarios I've outlined could take place without the use of these services. The questions before this Committee are: who is responsible—and who is accountable—for copyright infringements that take place over digital networks? If no one is responsible—or if no one is accountable—then how will we stop the flood of piracy that will surely follow? And, what recourse does an author, songwriter or movie producer have to recover the income lost due to online theft?

OSPs and other telecommunications companies have a key role to play in ensuring that this nightmare scenario never comes to pass. They must shoulder their fair share of this burden. Of course copyright owners must take the lead; our vigilance is absolutely essential in combating the growth of Internet-based piracy. But so is the cooperation of the service providers. Our copyright law must provide the right incentives to stimulate that cooperation. Accountability, under appropriate circumstances, for copyright violations committed by network users is one of the legal incentives provided under current law.

Some service providers have painted a nightmare scenario of their own. Unless the copyright law is changed to immunize them, they foresee a flood, not of Internet piracy, but of liability litigation. They assert that the burden of taking steps to prevent and detect online piracy will be crushing, that it will stunt the growth of the Internet and take down with it many of the high-flying cyberspace ventures that the World Wide Web has spawned.

This Committee must cast a cold eye on those predictions. They fly in the face of the experience of the first few years of this Internet revolution.

The feared flood of infringement litigation has never materialized. In fact, it is remarkable how few lawsuits have been brought in which copyright owners seek to hold OSPs or ISPs financially responsible for infringements committed on their networks. This should tell the Committee that the incentives provided by current law are working pretty well to encourage cooperation between copyright owners and service providers in the fight against piracy. I know that in many instances, motion picture companies and online service providers have worked together quickly, quietly and effectively to nip such situations in the bud.

Of those few cases that have gone to court, none has resulted in the imposition of debilitating damage awards on an "innocent" OSP or ISP that had no involvement, other than providing network services, in infringing activity. Where providers have been held liable, it's quite clear that they were well aware of, or were even active participants in, the violations enabled by their services.

As for the assertion that the threat of infringement liability is a sword of Damocles poised over the jugular vein of the Internet—it simply is not so! The growth rates of the business of providing access to the Internet are astronomical. The Interactive Services Association estimates that revenue for providing Internet access nearly quadrupled between 1995 and 1997; over the same time span, the number of households in North America with online access more than doubled. The subscriber base of the single leading OSP alone, America Online, just reached 9 million, three times the total of 2 years earlier. These statistics are the envy of many other sectors of the U.S. economy, including our own. The forward velocity of Internet growth is approaching warp speed; and if, as some telecommunications companies claim, the copyright liability issue is a drag on that momentum, mere mortals have been virtually unable to detect it.

As the Committee takes its long, hard look at this issue of online service provider liability, it will see a legal status quo that functions well. Over many decades, the courts have developed doctrines of vicarious and contributory liability that determine when one party—such as a service provider—can justly be held responsible for copyright infringements that are directly committed by another party—such as network users. In the few lawsuits that have been decided so far, the Federal courts have begun to apply these doctrines to the Internet environment, and the results show no threat of imminent doom to service providers. Before jumping straight to legislative "fixes" of the online liability "problem," Congress must specifically identify what—if anything—is broken in the current law. In other words, it should approach this issue with care, caution and a respect for continuity in our copyright law. If it does so, I believe it will conclude that any change in the statute on this issue is, at best, premature.

You may hear the argument that giving service providers full or partial immunity from copyright infringement liability is something the United States must do in order to implement the two new treaties negotiated last year at the World Intellectual Property Organization. You should reject that argument because it is manifestly untrue. Some countries did propose that the treaty be written in a way that would require ratifying countries to establish these immunities; but all those proposals were firmly rejected in Geneva. The treaty as actually drafted gives the United States, and every other country, sufficient latitude to craft the liability rules that best fit their own particular legal systems, so long as the law secures the rights guaranteed by the treaties and provides adequate remedies to deter and punish piracy.

I also urge you to approach with skepticism a variation on this argument that will certainly be put forward by some of our colleagues in the telecommunications business. It may be true, they will concede, that OSP liability relief isn't required in order to implement the treaties, but Congress should handle these issues in tandem anyway. Let me give you three reasons why you should resist this siren song.

First, ratifying and implementing the treaties should be a top priority for the United States. Implementing legislation already must address some controversial and complex issues, such as how best to outlaw circumvention of technologies used to protect copyrighted material against unauthorized access and copying. If online service provider liability is injected into this mix, the level of complexity and controversy will take a quantum leap. Any hope of rapid U.S. implementation of the treaties within the 1-year timeframe set by President Clinton earlier this month will go a-glimmering, and with it the U.S. position of leadership on global copyright policy.

Second, if treaty implementing legislation is expanded to embrace issues that are extraneous to the requirements of the treaties, it won't stop with OSP liability. There will be plenty of other copyright ornaments to hang on this legislative Christmas tree, thus further clouding the prospects for rapid U.S. adherence.

Third, even if OSP/ISP immunity legislation is "linked to," rather than "incorporated in," legislation to implement the new treaties, that subtle distinction will be completely lost on one of the important audiences for this exercise: governments around the world who are looking to the U.S. to lead the way into the new level of international copyright standards that these treaties represent. If these countries perceive that the U.S. is relaxing its liability standards at the same time that it is implementing the treaties, they will do likewise. I have confidence that if the

Congress of the United States chooses to go this route, it will ensure that strong and effective remedies against Internet-based piracy are preserved. I have no confidence that the same will be true in the legislatures of countries around the world which are already hotbeds of video piracy.

As more and more of our trade in copyrighted materials moves to digital networks, we must remember the truism that any chain is only as strong as its weakest link. If we were to change our law to further limit the liability of OSPs and ISPs, the weakening of that worldwide chain of copyright protection would be a clear and present danger to a very substantial segment of our economy.

OSPs and ISPs are essential to the future of electronic commerce. So are content providers who will create much of what travels over the electronic highway. OSPs and ISPs should not be placed in jeopardy by laws that subject them to unfair and unreasonable liability. Content providers should not be denied copyright protection which is essential to their existence.

The facts before us include no hard evidence that existing copyright law is imposing unreasonable or debilitating liability on OSPs and ISPs. There is hard, confirmable evidence that my industry alone is losing over $2 billion to pirates each and every year, and that piracy in the digital world will become even more costly.

I respectfully urge you to act on the basis of facts, not speculation. If you do, you will act to strengthen the copyright law, not weaken it.

Thank you for your attention.

The CHAIRMAN. Mr. Sherman.

STATEMENT OF CARY H. SHERMAN

Mr. SHERMAN. Thank you, Mr. Chairman and members of the committee, for the opportunity to testify today on Internet piracy and online liability. My name is Cary Sherman and I am the senior executive vice president and general counsel of the Recording Industry Association of America.

The Internet presents the music industry with tremendous opportunities. Record companies and artists can interact directly with consumers about the music they create. Our Web sites provide detailed information about artists, tour schedules, upcoming releases, and sound clips of current songs. We can also garner interest in new bands by giving consumers online access to audio and video clips that they may not hear on the radio or see on MTV. Already, some companies are experimenting with the online delivery of music directly to consumers. In short, the Internet offers an entirely new medium for the communication of music to a global marketplace.

Most people who access the Internet do so with personal computers. They were in 19 million U.S. homes in 1985. By the year 2000, they will be in 154 million homes in the United States and half a billion worldwide. The growth of the Internet can only be described as phenomenal. Just look at the purple on these slides to see how the Internet has connected virtually the entire planet in just the last 5 years.

What are all these people accessing on the Internet? Information, information that is stored on computer servers. There were 213 servers in 1981. Today, there are 60 million. By the year 2001, we expect to see 110 million servers.

What does this growth mean? A greatly expanded market for our music. Already, record retailers, record companies, new startup labels, and artists themselves are going online to offer their music directly to the consuming public. The ways through which consumers can access music are multiplying. Here are just a few examples of the new businesses sprouting up all over the Internet.

Retailers like Tower Records use a Web site to enable their customers to sample music. They can then place their order electronically and have the CD shipped right to their home. A new online company, superSonic BOOM, just announced that surfers can pick their favorite songs from a catalog of 30,000 jazz and oldies hits and create their own personalized CD's.

The Internet Underground Music Archive site lets users check out new bands and artists organized by genre and even location. J-Bird Records, the World Wide Web's first recording label, offers consumers the opportunity to purchase music from the artists signed to this cyberlabel. And, finally, Music Boulevard has begun to download music directly to consumers, selling music electronically instead of on physical discs.

Unfortunately, the rapid growth of the Internet also means peril for our industry. Our recordings are easily copied to a computer hard drive. Once on the computer, those copies can be uploaded to the Internet with the push of a button without the knowledge or authorization of the record companies, artists, songwriters, or musicians who created the music. And once the recordings are on the Internet, they are available to be downloaded by millions of users.

How do Internet users find these recordings? It is easy. This slide shows how a typical search engine points users to sites, some of which brazenly announce that they offer pirate songs. This slide shows once of those sites featuring hundreds of full-length songs listed alphabetically by artist, available for download by anyone, anywhere, at any time. This is what a downloaded recording sounds like.

[Sound recording demonstrated.]

Mr. SHERMAN. In case you don't recognize it, this is from the "Evita" soundtrack, and as you can hear, the sound quality is virtually indistinguishable from that of a compact disc. Songs by artists such as Mariah Carey, the Rolling Stones, the Police, Sheryl Crow—they are all available for download in near CD quality and they are all unauthorized.

Here is another example of a pirate site, "Jon's Take But Don't Tell Page." No doubt about the intent here. [Laughter.]

How long would it take you to copy the song we were listening to? About the same amount of time as it takes to listen to it. But using newer cable modem technology that is being rolled out into homes across the river in Alexandria right now, that song can be downloaded in a fraction of a second. Using a cable modem, a full 1-hour compact disc will be able to be downloaded in just 3 minutes. And once a user has downloaded those songs, they can be played back at any time as if the user had actually purchased the CD.

Mr. Chairman, imagine the impact on the songwriters, artists, musicians, background vocalists, record companies, and all the other creators of American music when their new single is sent up over the Internet with a potential of reaching millions of users worldwide with the click of a mouse. Imagine, also, the impact that pirate sites will have on companies, small and large, and artists who are attempting to build legitimate music businesses on the Internet. Why would anybody buy music from a Web entrepreneur when the same music is available from a Web pirate for free?

The good news is that current copyright law appears for now to be flexible enough to handle the new, ever-changing technology of the Internet. Just a few months ago, relying on well-established principles of copyright law, RIAA brought infringement actions against three music archive sites. Federal courts in New York, Texas, and California had no difficulty concluding that the operators of those sites were infringers and they issued restraining orders accordingly.

Note that the defendants in these cases were the individuals who operated the sites, not the Internet service providers or the telephone companies that provided Internet service to them. In fact, the Internet service providers were generally cooperative in providing information.

Several witnesses will testify today that the copyright law should be changed to provide exemptions from copyright liability for Internet access providers, or IAP's. They argue that copyright liability will stifle the growth of the Internet, chill investment in companies that provide Internet access, and unfairly harm their companies when they have no control over or knowledge of what users may be doing on their network.

Frankly, we don't see it. Look at some examples in today's world. In theory, bookstores are all technically at risk that they are committing or contributing to copyright infringement by virtue of their ordinary day-to-day business operations. The same can be said for printers, record retailers, book and magazine publishers, TV broadcasters, and scores of others.

Bookstore owners can't know the content of every book they sell. Magazine publishers can't know whether every word or picture they distribute is noninfringing. Yet, you don't see any of them quaking in their boots or clamoring to Congress for an exemption. What makes Internet access providers any different?

Nor are we aware of any onslaught of debilitating lawsuits that threaten the very foundation of the Internet. We count only a dozen or so decisions dealing with copyright liability on the Internet and only a couple of them have involved IAP's, and the one decision dealing directly with the issue of IAP liability came out on the side of the IAP.

Where, then, is the crisis? What is it precisely that we are trying to solve, and why should we be trying to solve anything by changes to the law when it is very possible that in the near future we will be able to use new technologies to deal with the infringement issues that technology has created?

Mr. Chairman, any proposal to exempt Internet access providers from copyright liability is a solution in search of a problem. We don't have a problem now, but if we try to legislate a solution, we most surely will have a problem in the future. Removing the possibility of liability would eliminate the incentive for Internet access providers to help deter infringements. It would discourage them from working with the creative community to combat online piracy. We need cooperation, not immunity.

Copyright protection is important to all of us and it is critical to the growth of legitimate electronic commerce on the Internet. You know the old saw, "If it ain't broke, don't fix it." Let us not jeopardize the copyright protection we all need by trying to fix a copyright system that is working, and working well.

Thank you very much.

The CHAIRMAN. Thank you.

[The prepared statement of Mr. Sherman follows:]

PREPARED STATEMENT OF CARY H. SHERMAN

Thank you, Mr. Chairman, Senator Leahy, and members of the Committee, for the opportunity to testify today on Internet piracy and online liability. My name is Cary Sherman, and I am the Senior Executive Vice President and General Counsel of the Recording Industry Association of America. The RIAA is the trade association representing the sound recording industry in Washington. The RIAA's member companies create, manufacture and/or distribute approximately 90 percent of all legitimate sound recordings produced and sold in the United States.

The Internet presents the sound recording industry with tremendous opportunities. Record companies and artists can interact directly with consumers about the music they create. Our websites now provide detailed information about artists, tour schedules, upcoming releases, and sound clips of current songs. We can also garner interest in new bands by giving consumers online access to audio and video clips that they may not hear on the radio or see on MTV. And, already, some companies are experimenting with the online delivery of music directly to consumers, on demand. In short, the Internet offers an entirely new medium for the communication of music to a global marketplace.

Most people who access the Internet do so with personal computers. In 1985, personal computers could be found in 19.1 million homes in the United States. Just 10 years later, this figure had reached 91.5 million, and it is estimated by the year 2000 to climb to 154 million homes. Worldwide, we're talking about more than a half billion PCs in people's homes.

The growth of the Internet can only be described as phenomenal. Just look at the purple on these slides to see how the Internet has connected virtually the entire planet in the last 5 years.

What are all these people accessing on the Internet? Information that is stored on computer servers. There were just 213 servers in 1981; today there are 16 million. By the year 2001, this figure is expected to explode to an astonishing 110 million servers.

What does this growth mean? It means a greatly expanded market for our music, just like for other creative works. Already, record retailers, record companies, new startup labels and artists themselves are going online to offer their music directly to the consuming public. While we do not anticipate traditional retail outlets to disappear, the ways through which consumers can access music will multiply. Today, we are seeing these new businesses sprout up all over the Internet. Here are just a few examples:

Retailers like Tower Records use a website to enable their customers to sample music; they can then place their order electronically and have the CD shipped right to their home; superSonic BOOM is a new online company that announced just last month that surfers at its website can pick their favorite songs from superSonic BOOM's catalog of 30,000 jazz and oldies hits to create their own personalized CDs; IUMA, or the Internet Underground Music Archive site, lets users check out new bands and artists, organizing this information by genre and even location; the site gets 250,000 "hits" every day and thus provides enormous exposure to the bands; J-Bird Records is the worldwide web's first recording label, offering consumers who visit their virtual record store the opportunity to purchase music from the artists signed to this cyberlabel; and finally, Music Boulevard has begun to download music directly to consumers—selling music electronically instead of on physical discs.

As you can see, the Internet holds great promise for electronic commerce for music and other forms of entertainment.

Unfortunately, the rapid growth of the Internet also means that the peril faced by our industry is of the same magnitude. Our sound recordings are easily copied to a computer hard drive. Once on the computer, those copies can be "uploaded" to the Internet with the push of a button without the knowledge or authorization of the record companies, artists, songwriters or musicians who created the music. And once the recordings are stored on servers on the Internet, they are available to be downloaded by millions of users.

How do Internet users find these recordings? It's easy. They can use any number of popular search engines to identify sites that contain sound recordings. This slide shows how a typical search engine points users to hundreds of sites, some of which brazenly announce that they offer "pirate songs." This slide shows one of those sites featuring hundreds of full-length songs, listed alphabetically by artist, available for download by anyone, anywhere, at any time. This is what a downloaded recording sounds like. (In case you don't recognize this track, this is Madonna performing her current hit from the "Evita" soundtrack). As you can hear, the sound quality is virtually indistinguishable from that of a compact disc. Songs by artists such as Mariah Carey, the Rolling Stones, the Police, Sheryl Crow—they're all available for download, in near CD-quality; and they're all unauthorized.

Here's another example of a pirate site—"Jon's Take But Don't Tell Page." No doubt about the intent here. Also, notice that when we downloaded this site, it had already received more than 36,000 visitors in a 3-month period.

How long would it take you to copy the song we're listening to now? Right now, this song can be downloaded in about the same amount of time as it takes to listen to it. But using newer cable modem technology that is being rolled out into homes across the river in Alexandria right now, this song can be downloaded in a fraction of a second. Just last week, Jones Communications announced that it will begin offering high-speed Internet connection through cable modems in Prince William County this month. Using a cable modem, a full 1-hour compact disc will be able to be downloaded in just 3 minutes. And, once a user has downloaded those songs, they can be played back at any time, as if the user had actually purchased the CD.

Mr. Chairman, imagine the impact on the songwriters, artists, musicians, background vocalists, record companies, and all the other creators of American music when their new single is sent up over the Internet with a potential of reaching millions of users worldwide with a click of a mouse. Thievery has reached new heights. Imagine, also, the impact that pirate sites will have on companies—small and large—and artists who are attempting to build legitimate music businesses on the Internet. Why would anybody buy music from a web entrepreneur when the same music is available from a web pirate for free?

The good news is that current copyright law appears, for now, to be flexible enough to handle the new, ever-changing technology of the Internet. Just a few months ago, relying on well-established principles of copyright law, RIAA brought infringement actions against three Music Archive Sites, including the one I demonstrated earlier. Federal courts in New York, Texas and California had no difficulty concluding that the operators of these Music Archive Sites were violating the rights of sound recording copyright owners, and they issued restraining orders accordingly. Note that the defendants in these cases were the individuals who operated the sites, not the Internet service providers or the telephone companies that provided Internet service to them. In fact, the Internet service providers were generally helpful and cooperative in providing relevant information once they learned of the infringing conduct of the defendants.

Several witnesses will testify today that the copyright law should be changed to provide exemptions from copyright liability for online service providers and Internet service providers (such as telephone companies). These Internet Access Providers, or IAPs, argue that copyright liability will stifle the growth of the Internet, chill investment in companies that provide Internet access, and unfairly harm their companies when they have no control over or knowledge of what users may be doing on their network.

Frankly, we don't see it. Look at some examples in today's world. In theory, bookstores are all technically at risk that they are committing or contributing to copyright infringement by virtue of their ordinary, day-to-day business operations. And the same can be said for record retailers, magazine publishers, TV broadcasters, and scores of others. And they've all been at risk for years. Bookstore owners, for example, cannot know the content of every book they sell. Magazine publishers cannot know whether every word or picture they distribute is non-infringing. Yet, you don't see any of them quaking in their boots or clamoring to Congress for an exemption. What makes Internet Access Providers any different?

Nor are we aware of any onslaught of debilitating lawsuits that threaten the very foundation of the Internet. To date, we count only a dozen or so decisions dealing with copyright liability on the Internet—and only a couple of them have involved IAPs. And the one decision dealing directly with the issue of IAP liability came out on the side of the IAP.

Where, then, is the crisis? What is it precisely that we're trying to solve? And why should we be trying to solve anything by changes to the law when it is very possible that in the near future we will be able to use new technologies to deal with the infringement issues that technology has created?

Mr. Chairman, any proposal to exempt Internet Access Providers from copyright liability is a solution in search of a problem. We don't have a problem now. But if we try to legislate a solution, we most surely will have a problem in the future. An outright exemption from liability would discourage the IAPs from working with creators to avoid infringements. We need cooperation, not immunity. Cooperation—that's the way to deal with the new world of the Internet.

If there is any burgeoning crisis on the Internet, it's the crisis of online piracy of intellectual property. The Committee will soon have before it two international copyright treaties that will help ensure that the copyright laws of other countries are as good as our own. Today we are unable to protect American investment around the world from piracy on the Internet. We need the legal rights necessary to fight online piracy wherever it occurs. No country has more at stake. We urge the Committee to move quickly to pass the implementation legislation for the WIPO treaties.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Burton.

STATEMENT OF DANIEL BURTON

Mr. BURTON. Thank you, Mr. Chairman and members of this committee, for holding these hearings. I am Dan Burton, with Novell. I share the sentiments expressed by my colleagues in the movie and recording industries, although I feel a little intimidated. Novell is not dealing with "Evita" and Madonna. I haven't been to film festivals in France and Italy lately. We are more in the plumbing business.

Novell creates the network software that allows much of the Internet and allows computers to talk to each other. We are a utility, I think, on the back of which much of the Internet revolution and the software revolution rides. We are fortunate to be founded and flourishing in the great State of Utah, and look forward to a long tenure there.

I am here today testifying on behalf not only of Novell, but also of the Business Software Alliance and the Software Publishers Association. BSA and SPA member companies provide the majority of the popular PC software products that we see on the market today and conduct vigorous anti-piracy campaigns in more than 50 countries worldwide.

I want to thank you, Mr. Chairman and members of this committee, for holding these hearings and for your tireless efforts to protect what is certainly one of America's greatest assets in the past, and I think will clearly even grow in importance in the future, and that is its intellectual property.

As I understand it, your goal today is to determine what changes, if any, are needed in current copyright law to ensure that both content providers and network service providers have a strong interest in promoting the rapid development of digital markets. Novell is in a unique position to comment on this issue, since we share the concerns of both content companies and network service providers.

As a company that creates software, Novell is a strong believer in enforcing copyright laws to prevent piracy on electronic networks. As a company that sells powerful cashing software and that counts over 55 million people on its networks, Novell is also sympathetic to the interests of equipment and service providers. After weighing both sides of this issue, we have concluded that copyright law should not be changed to create general immunities for online service providers. I would like to make five points in support of this conclusion.

No. 1, the concern about liability for network service providers is exaggerated. We all can recognize the dangerous chilling effect that pervasive litigation against network service providers would have on electronic commerce. The fact is, however, that there are many new entrants into this business and investment dollars are flowing freely. Network service providers are simply not paying onerous liability judgments today.

No. 2, and by contrast, the problem of electronic piracy on the Internet is very, very real. Over $12 billion was stolen from software companies last year, $2.3 billion in the United States alone. Commercial software products are available today illegally on thousands of sites on the Internet. Each time a copy of illegal software is posted on the one of the approximately 30,000 news groups in cyberspace, it becomes available to millions of people.

Point No. 3: the Internet and the market for electronic commerce are still evolving. The products, services, and companies that make up the Internet continue to change rapidly, and the market for electronic commerce still remains largely undefined. It is hard to predict how it will evolve and the business model that will ultimately prove successful.

Given this uncertainty, it is premature to change the current balance of the copyright law, especially since the law has proven to be sufficiently flexible to be fair in a digital environment. We recognize that there are situations in which the service provider is passively enabling distribution of a work and copyright liability should not result. For example, when works are delivered from one point to another, certain copies are made because simply that is the way the technology works and they do not involve a volitional act on the part of the entity transmitting the work.

The fourth point I would like to make is that the current copyright law is not an impediment to the development of the Internet. We do not see innocent intermediaries paying large judgments or going to jail for copyright infringement of users. We do see the operators of illegal Internet sites sued and shut down when they put copyrighted products onto those sites without permission. We also see Internet service providers cooperating to close infringing user sites when they have been identified.

The fifth point I would like to make, and the final point, is that two key Congressional actions are needed to help fight Internet piracy. First, we must clarify that criminal penalties apply when the pirate receives anything of value in return for an unauthorized copy of the work. Senators Leahy and Kyl have recently introduced a bill, the Criminal Copyright Improvements Act, to close this loophole. We support their bill and urge its enactment.

And, second, Congress must ratify the WIPO Copyright Treaty and implement its provisions on anticircumvention. That treaty would make it clear in international law that making a work available without permission is an act of infringement.

On balance, then, Mr. Chairman, we see no urgent need to legislate on the matter of liability of providers of networking service. Court cases to date have been fairly decided. There is no compelling evidence of a chilling effect in the marketplace from an absence of specific rules. That is not to say that such a need will never arise, but we would like to have more experience with this market and with this still rapidly emerging technology before we write new rules. Instead, we would encourage you to take action to fight the very real and persistent problem of Internet piracy, and we stand ready and willing to help you in whatever way we can in that effort.

Thank you.

The CHAIRMAN. Well, thank you.

[The prepared statement of Mr. Burton follows:]

PREPARED STATEMENT OF DANIEL BURTON

Mr. Chairman and Members of the Committee: I am Daniel Burton, Vice President of Novell. Today, I appear on behalf of the Business Software Alliance (BSA) and the Software Publishers Association (SPA), which appreciate the opportunity to testify before this Committee and thanks you for holding a hearing on the copyright law implications of network based-distribution of works.

Recently, 10 leaders of the software industry, including the CEO of Novell, Dr. Eric Schmidt, sent a letter to the U.S. Congress articulating 10 key principles to ensuring the success of electronic commerce. I would like to submit that letter for the record and note that one of those principles is strong intellectual property protection.

Novell and the member companies of the BSA and SPA approach this matter from the context of now evolving electronic commerce opportunities. In that context, we see that network operators and those providing the information content communicated over those networks, have shared interests and responsibilities.

- Their common interest is the rapid establishment and acceptance by consumers of electronic networks as a reliable, efficient, effective and robust means to conduct their business.
- Their common responsibility is to ensure that these networks are not abused or perverted to pernicious purposes, including making them a haven for those who would steal others' software.

Each of the BSA's and SPA's members is in the business of making the software and computer tools that will enable electronic commerce. The industry sees great potential for consumers, businesses and governments in the rapid growth and widespread use of the Internet and other network technologies.

We are now entering a new era in which software enables seamless interactions between computers, which in turn enable consumers and businesses to exchange information almost instantaneously and without regard to geography. This networking capability is the key to electronic commerce. Enabling it is a promising growth opportunity for the software industry and the U.S. economy in general.

The Internet and other network technologies "ride on" communications networks. Such communications technologies have enabled simple point-to-point communication for years, but it is software that empowers users to manipulate information, customize products and analyze data, and then interact with others to use the information productively. These are the essential elements which differentiate "communications" from "electronic commerce". Examples are as simple as ordering clothes from online mail order catalogs where the consumers can specify exact measurements and receive customized items, to complicated inventory-management programs that enable businesses to predict their needs in advance and order from suppliers only what they need and when they need it.

Electronic commerce is here today, but not yet on the mass scale we hope it will realize in the near future. The software products that enable electronic-commerce—web browsers, remote access software, data base management programs, collaborative project systems—are impressive, but in their infancy. The best is yet to come.

The biggest winners, aside from consumers, are likely to be small and mid-size businesses. Simply put, network technologies enable all businesses to compete in national and international markets by dramatically reducing their barriers to entry. Until recently, only large companies could afford the costs involved in far-flung business operations. The Internet has already changed this scenario. Benefits to businesses and individuals include:

- Reduced marketing and advertising costs,
- Reduced warehousing costs,
- Reduced retail space costs,
- Increased international opportunities, and
- Increased U.S. competitiveness

As we see it, these are the near term benefits we can attain through the rapid development of robust and secure network-based commerce, including the sale and distribution of copyrighted works.

Electronic commerce is already taking hold. Last year, nearly 1,000 software companies surveyed report that they use the Internet—including the world-wide web—in conducting business, and 48 percent expected to distribute software electronically. Also, in a recent Price Waterhouse survey, over 800 CEOs and senior executives identified their top concerns for the software industry, and among them were the effect of the Internet, intellectual property protection, and software piracy.

As we understand it, your goal is to determine what changes or clarifications, if any, are needed in current copyright law to ensure the rapid development of network delivery of works.

Networking environments indeed pose clear and present dangers of increased theft and misuse of works. By design, works in digital form are easy to copy and redistribute. With the aid of networks, thousands of copies of a single work can be distributed in seconds. The commercial harm of such mass piracy is self evident.

Every company in the software business is harmed daily by piracy. We estimate that Novell's commercial products are today available on as many as 1,000 sites on the Internet. This ranges from sites where counterfeit CD's from China are made available by mail order, to file-transfer sites where hackers put products for 50 million Internet users to download, to Web sites that publish illegal passwords to our products. Overall, the industry loses $12 billion per year to pirates.

At the same time, we see the dangerous chilling effect it would have on network-based commercial activity to hold liable for copyright infringement every single person—for example, developers of multi-purpose search engines, web browsers, or communications protocols—who had a role, however tenuous, in making such piracy possible.

As a general matter, we approach legislating on copyright liability in the Internet with great caution because network based distribution of works, such as software, as well as electronic commerce generally, are now in the early stages of development. To illustrate this point, just 2 years ago, the common wisdom was that the future of online activity would be driven by multi-faceted online service providers such as Prodigy, CompuServe and America Online. Today, the focal point is no-frills Internet access. Rapid enhancements and improved ease of use of the Internet and world-wide web are making the services offered directly by the access provider far less critical. Two years from now, with further technological change, the market is certain to shift again.

With this in mind, while we can identify a number of areas where changes in current law would enhance the ability of software companies fight piracy, it is very hard to identify specific aspects of the law which are today having an actual chilling effect on the development of network based businesses. To date, we have had but a handful of cases where liability of network operators was at issue in a copyright dispute. We are not aware of any major cases having been filed over the past 12 months, nor are we aware of any instance where AOL, Bell Atlantic, Sprint, or MCI, among others, have been sued for copyright infringement. To date, the courts have demonstrated their ability to interpret the copyright law flexibly, and in a manner which has produced fair results.

Moreover, we are not aware of evidence showing that the absence of a firm rule on the copyright liability of network operators is in any way chilling the development of the Internet, investment in network-based business, or new entrants into these markets. In fact, competition is thriving. Today, there are literally hundreds of companies, some large, and most very small, offering Internet access. From a consumer's perspective, not only is there lots of choice, but the cost of service is declining. Internet access is now widely available for $10, or less, per month.

This is not to say that we do not see the possibility of some court, in a future case, interpreting the copyright law in a way that would have a chilling effect. But until such a case is a reality, we believe that legislating based on hypothetical "chilling effects" may result in a remedy that is far worse than the ill it aims to cure. Given the rapidly changing nature of network based businesses, and our general inability to predict with certainty how these businesses will evolve, it is our judgment that the copyright law should not be changed to create general immunities for providers of network services.

It is our view that current law provides a sound balance. We have had good experiences in obtaining the help and collaboration of network operators in removing and/or blocking access to infringing material. In part, we believe such collaboration is due to the incentives now provided by the copyright law for online services and other intermediaries to cooperate with software companies. Based on my company's experience in software piracy on the Internet, the ephemeral character of many pirate software sites makes it extremely difficult to take action against pirates without help from service providers.

The most often cited cause of potential danger is the fact that under U.S. law, temporary copies of works constitute copies within the meaning of the Copyright Act. Thus, any copy of an infringing work, the argument is made, no matter how transient, would form the basis for liability. For example, a provider of network services, such as a phone company, because its routers and switches make temporary copies of an infringing copy of work in the course of its delivery between two points, would be liable for contributing to the infringing act.

While this is a misleading over-simplification of current U.S. law, some nonetheless argue that the solution is to declare temporary copies, such as copies in a router or a switch, as well as in a computer's random access memory (RAM), to be outside the scope of the copyright law. Such a solution is conceptually flawed, and would pose an extreme and immediate threat to the software industry. It is conceptually wrong because the life-span of the copy (its mere duration) has never been the factor that has determined whether a copy has been made. Whether a book is printed on fine bond paper and bound in leather, or whether it is printed on flash paper, is not what determines whether it is within the bounds of the copyright law, but rather whether the author of the work has authorized the making of that copy.

For the software industry, an overwhelming proportion of the copies of our works are "temporary." Today, the common way to make software available is through site licenses. Typically, a business will be given a single copy of a work, which will be copied onto a server (a central computer) and a defined number of people, for example 25, will be authorized by the terms of the license to use that work. These people, in the course of their using the software, will make temporary copies in RAM at their respective work stations of the software. If these temporary copies were outside the scope of the Copyright Act, the software vendor would be precluded from litigating if the business were permitting 100 or more persons to use the work, instead of the 25 which had been authorized under the license.

The problem would become more acute if this rule of excluding temporary copies were adopted internationally. If the server in the example above were located outside the United States, perhaps in a country with no copyright protection or on a ship on the high seas, and the only copies made in the United States were temporary copies in RAM in the course of using the work, the software developer would be left without any remedy for these acts of infringement.

We recognize, however, that not all temporary copies should lead copyright liability. For example, when a person accesses a page on the World Wide Web, that person's computer makes a temporary copy in RAM of that page—an act called caching. While no explicit permission may have been given to make that copy, because the web page could not be accessed without it, and the person making the web site available knew this, it is our view that caching by end-users should not create liability, because, in effect, such copies are implicitly licensed.

There are situations in which the service provider is passively enabling distribution of a work, and copyright liability should not result. For example, when works are delivered from one point to another, certain copies are made because of the way the technology works, and they do not involve a volitional act on the part of the entity transmitting the work. For example, the switches of a telephone system make copies of packets of data as they are routed across the country, while the system determines the most efficient way to route the data. Such copies while technically a copy, should not create liability.

Similarly, when providing e-mail services, the provider of the service may have to store the work, pending the user signing onto the system. Such stored copies, even if the material is infringing, should not lead to liability, so long as the only service provided by the operator of the system is to store the work pending retrieval.

These are but a few examples in a universe of situations where a network operator should not face liability. As a general matter, they have at least three features in common. First, the copy is made because the engineering design of the network's systems dictates the act, *i.e.*, it is made automatically and solely as a matter of engineering necessity and not as a matter of simple convenience. Second, in making the copy, the content is neither altered nor examined, it is simply passed through. Finally, the operator of the network system exercises no control over the content, its source, or its eventual destination.

A second element often raised in this context is the concept of "notice and takedown." Under this approach, operators of networking systems would be subject to liability only if they were first given notice of the fact that infringing material was on their system. Thus, a precondition for suit would be notice to the operator; the operator would then have to ignore such notice, and fail to "take down" the infringing copy, and only then would be liable. This is simply an unworkable model. When conducting anti-piracy work, and given nature of works in electronic form, making notice a precondition for suit would simply constitute an invitation for the pirate to destroy the evidence of his infringement. That is not to say that copyright owners should not be encouraged to work with network operators to stop infringement, some network operators are already working with us. But making notice a precondition to suit is not a solution.

Threats of piracy on the Internet are indeed quite real for the software industry. We believe that there are three areas where Congress should take immediate action.

Most urgent is the need to clarify that criminal penalties attach in all instances where the pirate receives anything of value in return for an unauthorized copy of the work.

In the recent litigation against a student at MIT operating a barter-bulletin board, a Massachusetts court speculated that no criminal liability would apply because Mr. LaMacchia did not receive cash payments for the copies of the pirated works obtained from his site. In fact, persons downloading software were required to upload copies of other works in return. Obviously these uploaded works had real commercial value. Thus, the criminal provisions of the law should be amended to make clear that receiving anything of value in return for a pirated copy of a work satisfied the laws provisions for criminal prosecution.

Making this change in the law is critical because the most effective way to put pirates out of business is to make them liable to criminal penalties.

Senators Leahy and Kyl recently introduced a bill which would specifically address this issue, S. 1044—"Criminal Copyright Improvement Act of 1997." We urge you to act promptly and favorably on this bill.

The other two areas of Congressional action are related. They are ratification of the WIPO Copyright Treaty, and implementation of its provisions on anti-circumvention. That Treaty would make clear in international law a key element already part of U.S. law; that making available a work without permission is an act of infringement. Today, the laws of many countries attach liability only to the person making the unauthorized copy (reproduction). In practical terms, that means that we cannot attack the source point of piracy by suing a person making the work available, such as the operator of a pirate bulletin board, but only the persons downloading from it. By ratifying the WIPO Copyright Treaty we will be leading the way for others to do the same, and in doing so amending their laws to making distributors of pirated works liable.

Software companies and other copyright owners are increasingly using technological means, such as scrambling, encryption, and electronic locks, to prevent piracy of their works. Today it is perfectly legal to make and sell tools intended to break such protections. A major feature of the WIPO Copyright Treaty is an obligation on Parties to make the sale and distribution of such devices illegal. We strongly support this provision of the Treaty. In implementing this provision, care must be taken, however, to focus on the devices intended to achieve illicit circumvention of effective technological protections, and not inadvertently make illegal multi-purpose computers or software.

Chairman Hatch recently introduced S. 1121, the "WIPO Copyright Treaties Implementation Act". This bill would enable the United States to become a Party to the WIPO Copyright Treaty. We support this bill, with only minor changes, and urge your prompt action.

On balance, Mr. Chairman, we do not see an urgent need to legislate on the matter of liability of providers of networking services. Court cases to date have been fairly decided, and we do not see compelling evidence of a chilling effect in the marketplace from an absence of specific rules. That is not to say that such need will never arise, but we would like to have more experience with information based economic activity before we write new rules.

Finally, we do see areas in urgent need of Congressional action to aid our fight against piracy: clarifying rules on criminal liability of operators of pirate bulletin boards; rapid ratification of the WIPO Copyright Treaty; and new rules making it illicit to defeat effective technological protections.

Thank you.

The CHAIRMAN. Mr. Vradenburg.

STATEMENT OF GEORGE VRADENBURG, III

Mr. VRADENBURG. Good morning, Mr. Chairman. I want to thank you for your personal leadership on this very important matter and your commitment to achieving a balanced approach to the issues that we are addressing here this morning. I also want to take note of the positive contribution made by Senator Ashcroft in the bill that he introduced yesterday afternoon. We claim partial residency both in Utah and Senator Kyl's district in Arizona, and I am pleased to be in the company of fellow geographic participants.

I am here today on behalf of the Ad Hoc Copyright Coalition, over 1,400 Internet service providers, content creators, telephone companies, among others, who are together building the Internet, the global communications medium of the 21st century.

I come here today with a unique perspective. Over the last 20 years, I have worked in the entertainment, recording, broadcast, and cable industries. At Twentieth Century Fox and CBS, I represented companies that invested literally billions of dollars a year in creative works distributed worldwide and whose financial viability depended upon the quality and integrity of the world's intellectual property regime. That experience has given me an enormous respect for the value of creative works and a special appreciation for the critical importance of the investment incentives created by copyright.

Today's issue is the relationship between the copyright system and the Internet. The Hollywood community argues that the growth of the Internet is a threat to the integrity of copyright and to the creative community; a "cancer," in the words of Jack Valenti.

I must tell you we have seen this movie before. The history and hostility of the content companies to new technologies is long and not very attractive. In the early 1970's, Arthur Taylor of CBS declared the cable industry a cancer on copyright and the broadcast system. In the early 1980's, the Hollywood community believed passionately that VCR home-copying of movies was a theft of their creative works that would doom the value of Hollywood film libraries. In the late 1980's, the recording community thought the same of digital audio tape technology.

The frequency of the apocolyptic and apoplectic visions of the content community to new technology reminds one of childhood stories of chicken little. In each instance, the film, broadcast, and recording industry has sought to suppress or cripple these new technologies. Fortunately, the content industries have not had their way. Cooler heads have prevailed. The copyright system has accommodated new technology and has proved more flexible and resilient than its defenders.

In the end, the very companies who sought to suppress new technologies have benefited handsomely from their development. So, too, with the Internet. The content industries express fear and anxiety about the Internet, but there is no question that authors of new interactive works, as well as of old linear works, will actually benefit from this more rapid, less expensive means of making their works available to consumers around the world.

The Internet is not a cancer; just the contrary. The Internet promises great economic and social benefits. In particular, the Internet promises a burst of creative energy and new creative works, importantly, from individuals whose personal creativity would otherwise never be seen or heard. Since the success of the Internet depends importantly on the quality of the content that flows through it, authors of creative works must have confidence that their valuable intellectual property is adequately and effectively protected.

At the same time, an equal measure of care must be taken to assure that in setting the bounds for such protection, technological innovation and the free flow of information not be stifled. Therefore, Congress must strike a careful balance between the interests of content creation and technological innovation, as Congress and as the courts have done with other innovations such as cable, xerography, satellites, DAT, and VCR's.

The rest of the world is watching how we, the world's creative and technology leaders, balance these issues. We must get it right. So how should we achieve that balance? Since we are here as part of the WIPO implementation process, I suggest we approach that question in the context contemplated by the treaties, namely an environment where intellectual property and Internet transmissions are protected primarily by secure encryption, supplemented by legal protections against circumvention.

In that context, where created works are securely encrypted, no one would claim that Internet service providers would be liable for transmission of an infringing work, since they would have no means of knowing or controlling the infringing transmission. With billions of messages flowing across the Internet in a single day, monitoring would not be financially feasible or, frankly, consistent with this Nation's commitment to communications privacy. The Hollywood position is thus, in my view, simply untenable.

Our message today is simple. Liability for copyright infringement should fall where it belongs, on the Web site operators, on those who create an infringing work or on those who reproduce it or perform it with actual knowledge of the infringement and who are capable, as a legal and practical matter, to do something about it.

If an Internet service provider itself posts infringing material, it should be liable. If the Web site operators in Mr. Sherman's example are posting infringing material, they should be liable. However, if an Internet user is using the conduits, the access, the browser, the navigation, or the cashing machines of an Internet service provider, it is the user and not the Internet service provider that should be responsible for the copyright infringement.

A workable solution to this issue requires service providers and content owners to work as a partnership, but a partnership on fair terms. Content owners must locate and identify infringing materials, and we as service providers must be willing to help remove them where it is legal and appropriate to do so. A balanced approach must also assure that any mechanisms designed to require or incent us to remove such materials from our systems be carefully designed to reflect important privacy, competitive, and other interests of third parties, as Senator Ashcroft's proposal has suggested, and to provide a speedy judicial resolution to infringement or fair use claims.

Finally, it is critical from our perspective that resolution of ISP liability be considered in conjunction with the legislation implementing the WIPO treaties on digital copyright. As those treaties expand and elaborate on copyrights in the digital environment implying liability for the disregard of those rights, we must at the same time carefully fix the bounds of that liability.

With a clear signal from Congress that it intends to address these issues together, the private parties will have the incentive to develop together a workable solution to these copyright issues. Just as other nations are seeking to set out clear and balanced ground rules for the digital age, we as the country leading Internet development must do so as well.

Mr. Chairman, I know you and the other committee members appreciate these points, that you recognize that challenge of developing a workable and fair balance among competing content and technology innovation issues as you refine our Nation's law on copyright as it applies to the Internet. We stand ready to work with the committee and its members and with other interested parties to resolve these issues and to get on with the business of building the most exciting communications medium on the planet.

Thank you again for inviting us here today.

The CHAIRMAN. Thank you.

[The prepared statement of Mr. Vradenburg follows:]

PREPARED STATEMENT OF GEORGE VRADENBURG, III

Good morning Mr. Chairman. I want to thank you for your personal leadership on this very important matter.

I am here today on behalf of the Ad Hoc Copyright Coalition, over 1,400 Internet service providers, content creators and telephone companies, among others, who together are building the Internet—the global communications medium of the 21st Century.

I come here today with a unique perspective. Over the last 20 years, I have worked in the entertainment, recording, broadcast and cable industries. At Twentieth Century Fox and CBS I represented companies that invested literally billions of dollars a year in creative works distributed world-wide and whose financial viability depended on the quality and integrity of the world's intellectual property regimes. That experience has given me an enormous respect for the value of creative works, and a special appreciation for the critical importance of the investment incentives created by copyright systems.

Today's issue is the relationship between the copyright system and the Internet. The Hollywood community argues that the growth of the Internet is a threat to the integrity of copyright and to the creative—community a "cancer" in the words of Jack Valenti. I must tell you, I've seen this "movie" before. The history of hostility of the content companies to new technologies is long and ugly. In the early 1970's, Arthur Taylor of CBS declared the cable industry a "cancer" on copyright and the broadcast system; in the early 1980's, the Hollywood community believed passionately that VCR home copying of movies was a "theft" of their creative works that would doom the value of Hollywood film libraries; and in the late 1980's, the recording community thought the same of digital audio tape technology. The frequency of the apocalyptic and apoplectic visions of the content community to new technology reminds one of childhood stories of "chicken little." In each instance, the film, broadcast and recording industry has sought to suppress or cripple these new technologies. Fortunately, the content industries have not had their way. Cooler heads have prevailed. The copyright system has accommodated new technologies and has proved more flexible and resilient than its defenders. In the end, the very companies who sought to suppress these new technologies have benefited handsomely from their subsequent development.

So, too, with the Internet. The content industries express fear and anxiety about the Internet, but there is no question that authors of new interactive works as well as of old linear works will actually benefit from this more rapid, less expensive means of making their works available to consumers around the world.

The Internet is not a "cancer". Just the contrary. The Internet promises great economic and social benefits. The Internet's capacity to promote electronic commerce, learning and the free exchange of ideas and democratic values world-wide is unmatched by any other communications medium in history. And the Internet promises a burst of creative energy and new creative works, importantly, from individuals whose personal creativity would otherwise never be seen or heard. Recognizing these enormous potential benefits, policymakers world-wide are united in seeking ways to promote and encourage the Internet's growth and success.

The United States leads the world, hands-down, in both the network technology and the content creation which will make the global Internet medium a reality. It will be the combined effort of content creators and Internet service providers who will drive this economic engine of domestic and export growth into the next century.

Since the success of the Internet depends importantly on the quality of the content that flows through it, authors of creative works must have confidence that their valuable intellectual property is adequately and effectively protected. At the same time, an equal measure of care must be taken to assure that in setting the bounds for such protection, technological innovation and the free flow of information not be stifled.

Therefore, in the interests not only of the consumers of this medium, but also the innovators of both the technology and creative works that will build it, and the U.S. economy and balance of trade, Congress must strike a careful balance between the interests of content creation and technological innovation—as Congress and the courts have done with other innovations such as cable, xerography, satellites, DAT and VCR's. And Congress must insist on a balanced application of copyright to this new innovation, as it has in the past, notwithstanding the seemingly perpetual anxiety of the incumbent content industry to the emergence of a competitive new medium relying on new technologies. The rest of the world is watching how we, the world's creative and technology leaders, balance these issues. We must get it right.

So, how should we achieve that balance? Since we are here as part of the WIPO implementation process, I suggest we approach that question in the context contemplated by the WIPO treaties, namely an environment where intellectual property in Internet transmissions of creative works are protected by secure encryption supplemented by legal prohibitions against circumvention. In that context, where creative works are securely encrypted, no one would claim that Internet service providers would be liable for transmission of an infringing work, since they would have no means of knowing or controlling the infringing transmission. Indeed, they would not be permitted to circumvent the encryption system protecting a transmission in order to assess a claim that a work is infringing and, if infringing, delete it. Yet, if you listen to my friends in Hollywood, Internet service providers should be placed in precisely that position; a position of monitoring, and deleting, potentially infringing communications of all Internet users, or otherwise stand financially responsible for any infringements. With billions of messages flowing across the Internet in a single day, such a monitoring requirement would not be financially feasible or, frankly, consistent with this nation's commitment to communications privacy. The Hollywood position is, in my view, simply untenable.[1]

Our message today is simple. Liability for copyright infringement should fall where it belongs—on those who create an infringing work or on those who reproduce or perform it with actual knowledge of the infringement and who are capable, as a legal and practical matter, to do something about it. The innocent or powerless transmitter should not be held liable for infringing acts of others. If an Internet service provider itself posts infringing material, it should be liable. If however, an Internet user is using the conduits, access, browser, navigation or caching machines of an Internet service provider, it is the user and not the Internet service provider that should be responsible for the copyright infringement. Fundamental fairness must limit the service provider's exposure.

Congress must make clear that service providers which act simply as a conduit for transmitting information are immune for third-party infringement. No other option is practical. The Internet is designed to split and separately route communications into billions of tiny, discrete digital packets in order to make the most efficient use of the network system. As a practical matter, it is impossible for conduit providers to know whether infringing material is in these transmissions or to do anything about it.

Similarly, in other cases, where an infringer is using the machines and software engines of an Internet service provider to place or transmit infringing materials, fairness dictates that a service provider's duty to act, and to be liable, should be triggered only when it has actual knowledge of the infringement, and where it is technically and legally feasible and economically reasonable, to remove or stop it.

A workable solution to this issue requires service providers and content owners to work as a partnership, but a partnership on fair terms. Content owners must locate and identify infringing materials, and service providers must be willing to help remove them where it is legal and appropriate to do so. A balanced approach must also assure that any mechanisms designed to require or incent service providers to remove such materials from their systems be carefully designed to reflect important privacy, competitive and other interests of third parties, and to provide a speedy judicial resolution of infringement or fair use claims. System providers should be protected from any claims that removal of potentially infringing material was wrongful, and transmitters whose material is removed must have a speedy resolution of their claims of wrongful removal.

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[1] I for one, do not believe that the full benefit of secure digital transmission systems for creative works can or will be fully realized unless and until national administrations also liberalize their regulation of encryption exports and thereby permit secure global distribution of creative works but this is an issue for another day

Finally, it is critical from our perspective that resolution of ISP liability be considered in conjunction with the legislation implementing the World Intellectual Property Organization treaties on digital copyright. As those treaties expand and elaborate on copyrights in the digital environment, implying liability for disregard of those rights, we must at the same time carefully fix the bounds of that liability. We are disappointed that the Administration's proposed implementing legislation, Senate Bill 1121, does not address these inherent liability issues. With a clear signal from Congress that it intends to address these issues together, the private parties will have the incentive to develop, together, a workable resolution to this copyright issue. Just as other nations are seeking to set out clear and balanced ground rules for the digital age, we, as the country leading Internet development, must do so as well.

Mr. Chairman, I know you and the other Committee members appreciate these points and that you recognize the challenge of developing a workable and fair balance among competing content and technology innovation issues as you refine copyright law's application to the Internet. We stand ready to work with the Committee and with other interested parties to resolve these issues and get on with the business of building the most exciting communications medium on the planet. Thank you again for inviting us to appear today.

The CHAIRMAN. Mr. Neel.

STATEMENT OF ROY NEEL

Mr. NEEL. Mr. Chairman, of course, there should be sanctions for copyright infringement. The harm that Mr. Sherman and Mr. Attaway have noted to their industry's potential, and current, is real and it may be even more serious in a digital environment. I would point out that the $2 billion Mr. Attaway points out that their industry has lost is really in street sales. That is not in transmissions over the Internet, so I think that clarification is important.

But the issue is who should be held liable for these infringements, and copyright law doesn't quite work now. It has been pointed out by Mr. Sherman that local telephone companies are not going to be sued in this environment. Well, that is a nice assurance, but that needs to be incorporated into law because current law is vague and telephone companies are liable, not only big telephone companies, but small, rural telephone companies, all 1,100 of them. This is not just big corporations against big corporations. You have got telephone companies and service providers everywhere that will be liable in this situation.

There are really a couple of issues here that are important. This environment is new. The Internet has no owner. It doesn't act like a big old xerox machine or a dance hall. Current copyright law works in those environments; it doesn't work for the Internet.

Clearly, our industry, the telephone industry, needs this protection as well. Frankly, we have substantial intellectual property, everything from directories, data bases, software, as well as traditional content. So we have every incentive to come up with a cooperative solution, but the fact is it has to be cooperative. It can't be simply on the back of the service provider or the carrier to police this.

Also, the fact is we can't do it. We have no way of knowing what those trillions of bits of information are flowing over our networks. We simply cannot do it, and to be held liable for those transmissions is simply nonsense and it will tie us up in court, create more litigation and more work for lawyers, but won't do anything to advance the construction and deployment of the Internet, nor will it protect copyright owners to any significant degree.

So the only realistic solution here is a system of notice and takedown. It is very simple. Each side has a responsibility. The copyright owner identifies when there is an alleged infringement and it notifies the carrier or the Internet service provider that there is suspicion of infringement and that service provider shuts it down. It is as simple as that.

You don't have to go into court to get an injunction under our solution here. You simply give the notice and the Internet service provider takes it down, and then it is up to the content owner to resolve this with the alleged offender here. The liability should not be on the carrier or the Internet service provider. Clearly, this would stifle the evolution of the Internet. You will have literally thousands of companies out there who can't be in business if they are under constant threat of huge lawsuits. Companies like Warner Brothers or whoever are in a position to come in and put a huge foot down on them and shut them down.

This system is cooperative. It has been mentioned earlier that the industry should come together and work out a solution. That is the best way to do it, but the other point here is that unless this committee exercises serious oversight over that negotiation, holds the industry's feet to the fire, particularly the content industry, there is no incentive whatsoever to negotiate and come up with an industry solution. The only way to do is to not move WIPO treaty legislation unless you solve this problem as well. If you do that, the content community, Hollywood, the record industry, will have no incentive whatsoever to come and work this problem out. If that doesn't happen, there will be serious legal problems, and clearly there will be legislative problems as well.

So I would just encourage you, in summary, to consider that this is not the old environment. Old copyright law doesn't work. A solution on liability is absolutely imperative and it ought to accompany in some form the treaty legislation implementation. We will come to the table. We will go into any room that you tell us to go into and we will sit there until this problem is worked out, with your oversight and with your hand over the process. It can't simply be assumed that the industries can come together and work this out on their own. It won't happen, and the only way to do that is to not move any treaty legislation until this liability problem is solved.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Neel.

[The prepared statement of Mr. Neel follows:]

PREPARED STATEMENT OF ROY NEEL

Good morning, my name is Roy Neel, President and CEO of the United States Telephone Association (USTA). USTA is the primary trade association of local telephone companies which serves more than 98 percent of the access lines in the United States and represents over 1,100 telephone companies ranging from the smallest of independents to the largest regional companies.

Until recently, two voices have dominated the debate about how to reconcile copyright law to the Internet. The first voice argues that the Internet poses an intractable threat to copyright law. To protect intellectual property in the online environment, the first voice urges that existing copyright doctrine strictly be applied to punish Internet service providers (ISPs) whose users commit copyright infringement. The second voice argues that copyright law poses an intractable threat to the Internet. To protect the Internet's unique capability to foster human communication, the second voice urges that the Internet be declared a copyright "free zone," immune from any legal regulation. Both of these voices reflect a siege mentality: the shared premise that there is an insoluble tension between the goals of copyright and the Internet. Each side digs in, refusing to admit the possibility of compromise.

The Clinton Administration has called on Congress to reject this siege mentality, and to work instead toward achieving "an equitable and balanced solution that is agreeable to interested parties"—ISPs and copyright holders alike. The United States Telephone Association (USTA) believes that achieving the Administration's goal is both desirable and possible.

There is no insoluble tension between the goals of copyright and the Internet. The stated purpose of our Constitution's copyright clause is to "promote the progress of science and the useful arts." The Internet (still in its infancy) promises to further that purpose as much as—and perhaps more than—any human invention.

However, some change to our current copyright law is necessary to make "an equitable and balanced solution" possible. Copyright law is the child of the printing press, which first made possible the widespread reproduction and dissemination of intellectual products. As technology has evolved, copyright law has adapted too, seeking to maintain a proper balance between encouraging the creation of intellectual products, and ensuring the public's reasonable access to those creations.

Until now, the task of adapting copyright law to the Internet has fallen to the courts. Unlike legislatures, courts are not free to adopt new rules appropriate to new technologies; they are constrained to proceed more cautiously, and on a case by case basis. When confronted with new technology, courts typically seek to draw analogies to older, more familiar technologies, to find the answers to today's problems in yesterday's innovations. So far, this has been the response of the few courts and commentators who have sought to reconcile the needs of ISPs and copyright holders. They have turned to analogies for guidance: Is the Internet analogous to a photocopy machine? A dance hall? A VCR?

The problem with this approach is that when we speak of the Internet, our analogies break down. The Internet is different. As the Supreme Court wrote recently, "The Internet is a unique and wholly new medium of worldwide human communication." *Reno, et al.* v. *ACLU*, __ U.S. __, __ S. Ct. __, __ (1997). The Internet has no owner. It knows no national boundaries. It is "constantly evolving and difficult to characterize." *Id.* at __.

As one commentator has warned, "The use of [existing] copyright concepts, without questioning the continued validity of the assumptions on which they rely may limit our understanding of the digitized environment." Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 Cardozo Arts & Ent. L. J. 345, 381 (1995). The size, scope, and utility of the Internet differ so greatly from all previous media that analogies provide limited assistance when we ask how to accommodate the needs of ISPs and copyright holders. What we need is a new set of norms.

The reason these questions rise to the fore at this juncture is that, under the current state of copyright law, ISPs risk being held liable for massive damages for copyright infringement perpetrated by individuals without the knowledge of the ISP. In other words, ISPs face the prospect of being adjudged culpable for copyright infringement of materials that simply cross their facilities, with no showing whatsoever of (a) willful disregard for the rights of any copyright owner or knowledge that their facilities are even being used for that infringing conduct. Plainly, something is wrong here.

What is wrong is the mechanical application, to the radically new realm of the Internet, of legal norms and doctrines that matured centuries ago, in the age of the printing press. Because of its historical roots, copyright law threatens to put a damper on the expression of ideas on the Internet and to entangle unknowing ISPs in liability on three potential bases: direct liability, vicarious liability, and contributory infringement.

DIRECT LIABILITY

Parties have sued sysops and online service providers on a theory of direct liability for copyright infringement, based on the activities of third parties in uploading infringing materials to their instrumentalities. Although opinions have resulted from those suits at the district court level, the circuit courts have yet to weigh in with precedential opinions. As a consequence, the bounds of direct liability have not yet been drawn with sufficient precision.

USTA believes that the proper analysis for direct liability in this context is the one used by Judge Whyte in *Religious Technology Ctr.* v. *Netcom online Communication Servs., Inc.*, 907 F. Supp. 1361, 1372 (N.D. Cal. 1995): "[T]he court does not find workable a theory of infringement that would hold the entire Internet liable for activities that cannot reasonably be deterred." Unfortunately, that decision was issued from a district court and therefore does not constitute stare decisis or carry much precedential weight.

Given scant authority outlining the contours of direct liability in this context, it is unclear how a similar future case would be ultimately resolved by other courts. Even if this were to proceed to a higher court, as long as it is unclear that ISPs are free from direct infringement simply for conducting their business—which a few unscrupulous customers may abuse for their own infringing purposes—the law's uncertainty casts a pall over the entire Internet.

VICARIOUS LIABILITY

The two elements required to hold a party vicariously liable are the ability to supervise or direct and a financial interest in the infringing conduct. In the most comprehensive opinion to address vicarious liability for ISPs, the court granted summary judgment against such liability. Netcom, 907 F. Supp. at 1377. In the course of its analysis, the court relied on a recent decision absolving swap-meet operators of liability for the sale of bootleg audio recordings on their premises. *Id.* at 1376–77, citing *Fonovisa, Inc.* v. *Cherry Auction, Inc.*, 847 F. Supp. 1492 (E.D. Cal. 1994). However, the Ninth Circuit recently reversed the *Fonovisa* district court holding. 76 F.3d 259 (9th Cir. 1996 lower court.) The question therefore arises whether, under the Ninth Circuit's expansive reading of vicarious liability, the *Netcom* case would reach the same result were it decided today.

One commentator argues that the Ninth Circuit's reversal would not make a practical difference; he relies on the fact that an ISP does not derive appreciable revenues from copyright infringement and, thus, stands in contrast to the dance-hall proprietor and the swap meet owner at which infringement notoriously occurred. See Carter Kirkwood, *Under Which Theory Should Computer Owners Be Liable for Copyright Infringement by their Users?*, 63 U. Chi. L. Rev. 709 (1997).

We agree with that conclusion. Unfortunately, its most salient feature is that it is precisely that—only speculation. We simply do not know how courts would rule—even how *Netcom* itself would be decided today, after the district court case on which it relied was itself reversed by the Ninth Circuit. That type of uncertainty is inimical to the growth of our industry. Again, USTA supports the adoption of certain and sensible equitable business norms for the Internet world.

CONTRIBUTORY INFRINGEMENT

The elements required for contributory infringement include knowledge of the infringing conduct and facilitating its consummation. The potential mischief comes from the definition of "knowledge." If all courts applied a standard that contributory infringement exists only when the defendant had actual knowledge of the occurrence of copyright infringement, then USTA would not be troubled. Unfortunately, however, some courts construe the knowledge requirement not as actual knowledge, but as constructive knowledge—meaning that had the defendant engaged in further investigation, it might have uncovered the infringing nature of the subject material.

The difficulty with that scheme in the Internet context is only too apparent. While it may have been reasonable to hold the owner of a dance hall liable to investigate each song performed, it is unrealistic to hold an entity responsible for ten million "songs" transmitted through its "premises" simultaneously. Had the cases initially involved ISPs rather than dance halls, they never would have developed the doctrine of constructive knowledge in its current form.

A MORE SENSIBLE APPROACH

Our proposal is that copyright owners and ISPs should share responsibility for protecting intellectual property on the Internet. When copyright owners discover infringement online, they should notify the ISP whose servers access the infringing material. When ISPs acquire actual knowledge that their services are being misused for infringing purposes, they should be obligated to take reasonable steps to halt further abuse. In response to appropriate notice from the copyright owner, ISPs should be obligated to prevent their services from being used to access infringing material. If, however, an ISP has neither received notice of infringement nor otherwise has actual knowledge that it is occurring, then it should not be held responsible for the acts of third parties. We believe this proposal allocates responsibility for protecting intellectual property fairly and efficiently.

First, it is entirely appropriate to hold ISPs responsible when they commit copyright infringement, or have actual knowledge that specific materials being sent over their facilities infringe a copyright. Under these circumstances, the ISPs can, as a practical matter, stop the infringing activity.

Where, however, ISPs neither facilitate copyright infringement, nor know about it, it would be inappropriate to hold them liable. Unfortunately, current law would hold ISPs liable in precisely this situation. Apologists for the current law argue that it encourages ISPs to ferret out copyright infringement on the Internet. But is it true? Is it possible? And would it be worth it?

We think not. First, such a regime would raise grave privacy concerns. Currently, ISPs do not spend their time monitoring every customer's transfer of electronic data. We, as a society, do not want ISPs to initiate such a massive invasion of privacy.

Second, if ISPs were required to employ an army of snoops to pick through every user's e-mail and Usenet postings, the enormous costs would be passed onto consumers. The consequence would be to convert a convenient and democratic medium into an expensive and elite one.

Finally and more importantly, even if ISPs could investigate every corner of the expanding online universe, ISPs would have no way of knowing whether the material they encounter is authorized by the current copyright owner or not. The Internet use of the copyright could be a licensed use in a vast chain of contracts that only months of research could uncover.

We believe that the task of ferreting out copyright infringement on the Internet should fall to the copyright owner. Today, copyright owners have access to a large array of Internet search engines and "spiders" to sniff out material they know belongs to them (unlike the ISPs, who cannot be certain who may have recently purchased which copyrighted material.) Once the copyright owners discover infringement, they can bring it to the attention of the ISPs. It is at this point that the ISPs can sensibly act.

The regime we propose is one of joint responsibility between copyright owners and ISPs. USTA would support legislation that spells out the obligations of ISPs to take appropriate remedial action in response to notices from affected copyright holders. Obviously, part of that regime must also include an exemption for the ISP from liability to those who may be adversely affected by the ISP's remedial action, even if it is ultimately determined that the material that is screened-off or taken down by the ISP is not, in fact, infringing.

CONCLUSION

Our endorsement of the Administration's call for a legislative response necessarily rejects the "wild, wild west" view of cyberspace—the view that the Internet must be free of all legal regulations. USTA strongly supports protection for copyright and other legal interests on the Internet. While the USTA-member telephone companies provide Internet access services, they are also owners of vast holdings of intellectual property—ranging from directories to software to traditional literary and audiovisual works. Our members have powerful incentives to preserve the value of their copyright portfolios through the protection of our nation's intellectual property laws. That is why we believe that USTA is uniquely situated to appreciate both sides of the critical issues before Congress today.

To promote the progress of knowledge on the Internet, those who are building the Net itself need fair and predictable ground rules. Our proposal is designed with that goal in mind. We look forward to working with the Committee to help forge a consensus on how to resolve this complex issue.

The CHAIRMAN. Mr. Oakley.

STATEMENT OF ROBERT L. OAKLEY

Mr. OAKLEY. Thank you, Mr. Chairman. Good morning, Mr. Chairman, members of the committee. My name is Robert Oakley. I am the director of the law library and professor of law at the

Georgetown University Law Center. I grew up in Utah, so it is sort of my spiritual home, and I do work at Georgetown so I do have the tie with Senator Leahy.

I do serve as the Washington affairs representative for the American Association of Law Libraries, and I am certainly honored to appear before the committee today not only on behalf of AALL, but for 17 of the Nation's other principal educational and library organizations.

The educational and library organizations which I represent here today are committed to a balanced intellectual property law and policy encompassing both strong copyright protection for owners, as well as the provisions in the law that promote access to information for users.

In today's world, libraries and educational institutions are online service providers for their communities. Unfortunately, they will not be able to fully exploit the creative benefits of the new technology if they are subjected to unwarranted online service provider liability. We were certainly very pleased to see that Senator Ashcroft has stepped forward in the bill he introduced yesterday to deal in a balanced way with a whole suite of intellectual property issues of interest to our communities, including, among others, the issue of online service provider liability which we are focused on here today.

The education and library communities believe that four key principles should be considered as Congress debates any online liability system. First, copyright law should foster an environment in which the broadest possible spectrum of the public enjoys the educational and cultural benefits of the Internet.

Mr. Chairman, many of our institutions are being asked by policymakers at every level of government to be the public's on-ramps to the information superhighway, a role that many of our institutions are actively pursuing. But without reasonable insulation from liability based solely on the activity of network users over which our institutions have no control, educational and library institutions may be forced to abandon the effort to provide access points to the Internet. Copyright law should uphold the principle that liability for infringing activity rests with the infringing party and not with others.

Second, any liability system should permit libraries and educational institutions to use state-of-the-art navigational systems and practices to facilitate access to information. Early in last year's discussions regarding online service provider liability, it became clear that the mere provision of links to other sites on the Internet might be a factor in determining the liability of an information access provider.

Libraries and educational institutions share our commercial colleagues' view that linkage is a unique and fundamentally positive technological tool. In fact, it has enormous potential to greatly enhance the educational process and the public's access to information. It should therefore be presumptively viewed as a practice to be encouraged rather than chilled by the Copyright Act.

Third, in those instances where institutions are appropriately held indirectly liable for copyright infringement, such liability should be limited to injunctive relief. Libraries and educationals do not seek, as was suggested here, a blanket exemption from liability. Instead, we seek exemption where someone else, a user over whom we have no control, is the culpable party.

We also believe, Mr. Chairman, that except in cases of direct liability, the exposure of libraries and educational institutions can and should be limited to injunctive relief. Unless reasonably limited in this manner, library and educational institutions will be especially vulnerable to strategic litigation that could have a serious chilling effect on our communities.

Fourth, any online service provider liability system adopted should recognize and incorporate the general practices and principles adopted by libraries and educational institutions to protect individual privacy. Last year's debate and negotiations made clear that information proprietors may request that service providers either disclose information concerning the identity or information access patterns of individuals suspected of copyright violation, or summarily terminate services provided to the individual under suspicion.

Members of the library and educational communities wish to call attention to certain special characteristics of our activities that must be considered in any legislative solution to the issue of service provider liability. Educational institutions have honor codes built on broadly accepted professional principles which, when breached, can result in expulsion or loss of privileges, such as network use. Similarly, someone who breaches a library's acceptable use policy can lose print and electronic library privileges.

In educational and library settings, however, law and practice afford individuals a higher expectation of privacy and a greater sense of due process than in the commercial environment. Academic freedom and constitutional guarantees of freedom of thought, association, and speech require that individual privacy and due process be respected.

Thank you, Mr. Chairman, for this early and important opportunity to help establish the framework for the coming debate. We look forward to working closely with the committee to update the Copyright Act to meet the challenges and maximize the opportunities of the digital environment.

The CHAIRMAN. Well, thank you, Mr. Oakley.

[The prepared statement of Mr. Oakley follows:]

PREPARED STATEMENT OF ROBERT L. OAKLEY

Good morning, Mr. Chairman, Senator Leahy, and Members of the Committee. My name is Robert Oakley. I am a Professor of Law at the Georgetown University Law Center and Director of the Law Center's Library. I also serve as Washington Affairs Representative for the American Association of Law Libraries. I am honored to appear before the Committee today not only on behalf of AALL, but for 17 of the Nation's other principal educational and library organizations.

These educational and library organizations are committed to balanced intellectual property law and policy. By "balanced," Mr. Chairman, I mean that these organizations respect and support strong copyright protection. We are equally committed, however, to strong statutory respect for the Constitutional objective that is the foundation of copyright law: "the Progress of Science and useful Arts," and to the principle of Fair Use.

Copyright is at root about promoting creativity. As creators and owners of intellectual property we understand that creativity results not just from the financial incentive for authors and inventors codified in Title 17 of the U.S. Code, but also from many provisions in the statute which promote access to copyrighted information. As

I indicated when I appeared before this Committee last May, the best measure of our copyright law's success is whether it fairly balances those equal priorities in the service of the Framer's commitment to the broad dissemination of knowledge and information in a democracy.

The library and educational communities encompass a broad range of public and private institutions whose primary missions include education, research, and the preservation of our scientific and cultural heritage. In the process of carrying out their missions, these institutions—which include research universities, colleges, libraries, and schools—are both creators and consumers of scholarly communication. As such, these institutions participate in the full spectrum of activities regulated by the laws governing copyright and must be sensitive to the balance of interests embodied in them. Thus, they are keenly interested in the emerging debate over OSP liability.

As they revolutionize the means by which information is recorded, disseminated, accessed, and stored, digital technologies are changing the technical limits that have supplemented the legal framework of balance between ownership and public dissemination. The unlimited technological capacity to disseminate by transmission in ways that can violate the rights of copyright holders confronts equally unlimited technological capacity to prevent works from being used in ways contemplated by law. Carried to its logical extreme, either trend would destroy the balance, with results that would likely undermine core educational functions as well as radically transform the information marketplace.

Intellectual property is a significant form of social capital, whose growth depends on its circulation, exploitation, and use. As a major arena in which intellectual property is created and disseminated, educational institutions and libraries have nurtured an ethic of intellectual property based on:

- Respect for the rights of creators and copyright owners;
- Accurate attribution of authorship and respect for a work's integrity;
- Assurance that copyrighted works may be preserved from deterioration;
- Promotion of information dissemination and access; and
- Economic viability of the scholarly communications system.

Unfortunately, educators and librarians will not be able to fully exploit the creative benefits of new technology if they are subjected to unwarranted "online service provider" liability or are unable to purchase or use devices essential for displaying or recording educational materials or useful other information.

Accordingly, the issue of "online service provider" liability is as important to libraries and educational institutions as it is to those in the telecommunications and Internet services industries. Unlike last year's debate, there now appears to be clear appreciation domestically and internationally that balanced intellectual property policy cannot stand on proprietors' rights alone. In addition, remedies to enforce proprietors' rights, and exceptions to those rights, have been and must continue to be the critical second and third pillars—indispensable and integral elements—of this Nation's copyright system.

The education and library communities believe that four key principles should be considered as Congress debates any "online" liability system:

I. Copyright law should foster an environment in which the broadest possible spectrum of the public enjoys the educational and cultural benefits of the Internet;

II. Any liability system ultimately adopted should permit libraries and educational institutions to use state-of-the-art "navigational" systems and practices to facilitate access to information.

III. In those instances where institutions are appropriately held indirectly liable for copyright infringement, such liability should be limited to injunctive relief; and

IV. Any service-provider liability regime adopted should respect and incorporate the general practices and principles adopted by libraries and educational institutions to protect individual privacy.

Permit me to elaborate on each of these principles:

I. Copyright law should foster an environment in which the broadest possible spectrum of the public enjoys the educational and cultural benefits of the Internet. The 125 nations represented at the WIPO conference in Geneva this past December—including the United States Government—unanimously agreed without debate that simply providing "facilities for enabling or making a communication" should not serve as the basis for copyright infringement liability based solely on the actions of someone who uses those facilities. Mr. Chairman, many of our institutions are being asked by policymakers at every level of government to be the public's "on-ramps" to the information superhighway—a role that many institutions are actively pursuing. Indeed, Congress recently voted to assure that many of our institutions receive discounted telecommunications services rates so that we can accomplish that mission.

Without reasonable insulation from liability based solely on the activities of school and library network users over which our institutions have no control, educational and library institutions may be forced by the prospect of crippling liability to call a halt to building new, or to dismantle or disable existing, access points to the Internet.

Copyright law should uphold the principle that liability for infringing activity in the network environment rests primarily with the infringing party rather than with third parties. Institutions should accept responsibility for acts undertaken at their behest, but should not be held liable for the acts of individuals—whether or not associated with the institution—who act independently. This principle is an essential underpinning of academic freedom.

The educational and library communities thus oppose OSP copyright legislation that would make institutions liable for the acts of individuals acting on their own initiative, or that would impose prior censorship. Copyright enforcement provisions should uphold principles of due process in determining whether specific allegations of infringement are valid. Educational institutions accept responsibility for establishing policies, carrying out due process when appropriate, and creating climates in which all those who use their facilities and resources use copyrighted materials appropriately.

For example, Mr. Chairman, Utah State University—an active member of one of the national organizations I have the pleasure of representing today—is a highly respected land grant university with an on-campus population of approximately 16,000 and 4,000 off-campus, non-traditional students. Utah State provides approximately 21,000 points of access to the Internet for e-mail, Internet browsing, library services and information exchange. These services are used in campus-based and distance learning. In fact, in most cases, the end-users (students and faculty) access the network from locations which cannot be supervised, such as residence halls, offices and laboratories. Utah State does, however, advise users of its system of their obligations and responsibilities to respect intellectual property rights through training programs, log-in messages, and online and print information provided by the University's Computer Services department.

We believe, Mr. Chairman, that no service provider, no phone company, no educational institution and no library which operates a computer network should be forced to factor into its plans to bring the benefits of the Internet to the public potential liability based solely on its role as an information conduit. Just as protection against the illegal use of copyrighted information is a prerequisite for copyright owners to putting their "content" online, so too is insulation from unreasonable liability a prerequisite for both commercial and non-commercial institutions to building, deploying and accessing the Internet.

II. Any liability system ultimately adopted should permit libraries and educational institutions to use state-of-the-art "navigational" systems and practices to facilitate access to information. As you may know, Mr. Chairman, library and higher education organizations were privileged to be represented in the "all party" liability negotiations directed by Congressman Bob Goodlatte of Virginia. It is our understanding that Chairman Coble has asked Mr. Goodlatte to reconvene those talks this year and we look forward, once again, to participating.

Early in last year's discussions regarding online service provider liability, it became clear that the provision of "links" to other parties' information sites on the Internet might be considered a significant factor in assigning liability to an information access provider. The entire concept of "highlighting-" and "linking-based" liability was and remains of great concern to educational institutions and libraries because of its potential to make illegal valuable activities historically at the core of education and librarianship: the pedagogical presentation and organization of lawfully acquired or referenced copyrighted information.

Libraries and educational institutions share our commercial colleagues' view that linkage is a unique and fundamentally positive technological tool. In our universes, it certainly has enormous potential to greatly enhance the educational process and the public's access to information. It should, therefore, be presumptively viewed as a practice and protocol to be encouraged rather than chilled by the Copyright Act. It is important to note that in contrast to the "conduit" issue, "one-size" policies and definitions regarding "highlighting" and "linking" may not fit all stakeholders in the complex debate to come.

III. In those instances where institutions are appropriately held indirectly liable for copyright infringement, such liability should be limited to injunctive relief. Libraries and educational institutions do not seek a blanket exemption from liability of any kind. Implicit in that position is a recognition that, under certain circumstances yet to be fully defined, a library or educational institution may be held liable for copyright infringement and subject to appropriate penalties. We believe, Mr. Chairman, that except in cases of direct liability, the exposure of libraries and educational institutions can and should be limited to injunctive relief. Unless reasonably limited in this manner, library and educational institutions (many of them publicly funded) will be especially vulnerable to the kind of strategic litigation practices already evidenced by some "content" industries. As discussed earlier, educational and public access to the Internet will be the inevitable casualties of such campaigns. In any event, they should not be subjected to the threat of criminal penalties.

IV. Any service-provider liability regime adopted should respect and incorporate the general practices and principles adopted by libraries and educational institutions to protect individual privacy. Last year's debate and negotiations made clear that information proprietors may request that service providers either disclose information concerning the identity or information access patterns of individuals suspected of copyright violation, or terminate services provided to the individual under suspicion. Members of the library and educational communities wish to call attention to certain special characteristics of our activities that must be taken into account in any legislative solution to the issue of service provider liability.

For example, when you or I use the facilities of a telephone company, Internet access provider or online service provider facilities, we do so pursuant to a contract or subscriber agreement in which we typically acknowledge that service may be terminated under specified conditions. When a student or teacher uses a school-based information network, or a member of the public uses a branch library, however, the bases of the "transaction"—the ground rules—are quite different. Educational institutions have honor codes built on broadly accepted professional principles which, when breached, can result in expulsion or loss of privileges such as network use. Similarly, someone who breaches a library's "acceptable use" policy can lose print and electronic library privileges. In educational and library settings, however, individuals may enjoy a higher expectation of privacy than in the commercial environment. Moreover, they have a justified expectation that their rights to engage in lawful discourse, print and electronic, will be respected.

These expectations arise from institutional codes and policies which are not based on contract. Rather, they have their roots in our collective mission: promoting the growth and dissemination of knowledge. Academic freedom and the Constitutional guarantees of freedom of thought, association, and speech require that these policies be respected. Clearly, those who break the law or violate institutional use policies must be punished. But, unless the unique concerns, in particular privacy and confidentiality, which manifest themselves in library and educational institutions are recognized and respected in the service provider debate, we will put at risk the very objective on which the Framer's grounded the Constitution's Copyright Clause: promoting the "Progress of Science and useful Arts."

As creators and repositories of vast amounts of intellectual property, educational institutions and libraries have both a responsibility and a need to assure that their own institutional practices conform to the requirements of intellectual property law and that their constituencies are well informed about their responsibilities. Institutional practices should set high standards for compliance and can serve as an educational tool for heightening the consciousness of individuals within the educational and library communities of what the law demands.

In conclusion, Mr. Chairman, the Nation's educators and librarians are committed to developing a digital environment that fosters a robust information market by providing effective incentives for the creation of intellectual property, the reliable protection of proprietary rights, and appropriate exemptions from those rights designed to assure the widest possible access to and use of information. In sum, we believe that the best way to achieve that goal, and with it an effective liability system governing online information access, is by carefully balancing all of the affected interests.

Thank you and the Committee for this early and important opportunity to help establish the framework of the coming debate. We look forward to working closely with the Committee to update the Copyright Act to meet the challenges, and maximize the opportunities, of the digital environment.

Thank you again, Mr. Chairman.

The CHAIRMAN. Let me just start with some questions to Mr. Vradenburg and Mr. Neel. For a moment, I want to explore the relationships which currently exist between content providers and service providers, and why it is, given the profit incentives that a robust Internet market presents both sides, a private resolution of these liability issues is so difficult to obtain or to reach.

In entering into licensing agreements with content providers, what burdens do service providers typically assume in order to prevent knowing and willful infringement of copyright?

Mr. VRADENBURG. Let me start, Senator, by answering it in the following way. To the extent that we have a relationship of any character with respect to the content in our system, either we produce it ourselves or we enter into partnership relationships with those who provide content in our system. We have licensing arrangements of the same kind that a broadcast network or a movie studio would have. And with respect to that material, we obviously enter into private arrangements that assure that the material is not infringing, that it is represented not to be infringing, and that we are indemnified if, in fact, the material is infringing.

I think the difficult issue arises when there are Web sites out there with whom we have absolutely no legal relationship, but where the simple operation of the engines that are part of the navigation, browsing, and access systems of these networks provide access to those Web sites.

It seems to me that Mr. Sherman was arguing that, in fact, existing law is adequate to deal with this because he, in fact, can go chase the Web sites, and that is precisely our point. If, in fact, existing law is adequate, he can go chase the Web sites and he wouldn't be here trying to propose a change in existing law through the implementation of the WIPO treaties and some change in domestic law associated with that. So I think his case proves too much.

If, in fact, it were clear under existing law, which I think it is not clear at the moment—if it were clear under existing law that we were liable for those infringements and became the guarantors of the infringement of all of the Web sites of the world, then I think you both have imposed potentially massive liability on the Internet service providers, but you have also created perverse incentives; that is, the Web site operators of the world know that they can go ahead and infringe willy nilly and that, in fact, any copyright owner of any merit will simply chase the larger, deeper pocket.

You will have created exactly the wrong incentives. You ought to be creating some discipline in the world that Web site creators ought not to be infringing and if they infringe, they are liable, and that no one else is going to be standing behind them as the guarantor of their liability, namely ISP's. So to relieve the ISP of liability in the circumstance where the ISP has no knowledge or control over this situation and to impose it on the Web site operator is precisely where I think the liability ought to be imposed.

There is no question that we are ready, willing and able as a matter of business practice and as a matter of seeking a legislative solution to sit down with the content industries to figure out the mechanisms that will eliminate pirated material from our system because, in fact, in the longer term we are going to provide a very efficient global distribution system for the creative works of these gentlemen and the ladies and gentlemen that stand behind them in terms of distributing their works around the world. In fact, we are going to have to be friendly to the content industries in order to assure them that their works are adequately protected when they go on our systems.

The CHAIRMAN. Do you care to add to that?

Mr. NEEL. Well, Mr. Chairman, insofar as many of our companies are also Internet service providers, I would identify with Mr. Vradenburg's remarks. I would point out that the amount of revenues for telephone companies on Internet services from the kinds of software we are talking about—movies, and so on, and music—is infinitesimal, and even for Internet revenues would be infinitesimal. Most of our revenues over the Internet came from data transmissions, so the licensing issues are not relevant to most telephone companies in that context.

The CHAIRMAN. Does the technology exist at the present time, or do we foresee such technology in the future which can allow networks to more easily detect transmissions which may be or are infringing?

Mr. NEEL. I would like to address that and I am sure George would, too. The short answer is no.

The CHAIRMAN. I have been told that technology does exist.

Mr. NEEL. Well, the technology may exist for copyright owners to be able to go out there and identify when their property rights are being infringed.

The CHAIRMAN. I have been told that it does exist if content providers and service providers are able to agree on a market protocol.

Mr. VRADENBURG. I would think, Mr. Chairman, that the answer——

The CHAIRMAN. Am I wrong on that?

Mr. VRADENBURG. Well, I think that there is some possibility that, in fact, if there is an agreed upon system for imposing either digital signature or copyright management information in an encrypted transmission, then we are going to be able to identify, along with the content owner, when that work has been distributed somewhere in the system potentially.

I think we may need an amendment to some of the existing statutes which do prohibit us from looking at private transmissions on the Internet. But subject to that, I think that there is some solution there. What the problem is is that if someone takes off that information or someone creates a work that is infringing, but does not contain that information, it is difficult then to understand exactly what it is that are the bits that are coming through the system and whether they are infringing or non-infringing.

The CHAIRMAN. Senator Ashcroft, may I ask just one question of the content providers? My time is up and then I will turn to you. Is that OK?

Senator ASHCROFT. You are the chairman and you may exercise your right.

The CHAIRMAN. Well, no, no. I am a very courteous chairman. [Laughter.]

If you will grant me to do that, I would appreciate that.

Let me just ask you content providers, I gather from your testimony you don't think any change in current law is necessary. Am I right about that?

Mr. SHERMAN. That is correct.

The CHAIRMAN. Basically, all three of you agree?

Mr. ATTAWAY. That is absolutely correct. And to correct something that Mr. Vradenburg said, we are not seeking any change in the law with regard to the liability of online service providers. The WIPO treaties that we support do not deal with that subject in any way.

The CHAIRMAN. Well, as I understand it, under current law if A sends a copyrighted work over the Internet to B, then absent permission from the copyright owner, A, B and any service provider engaged in the transmission would be liable for copyright infringement. Is that your contention?

Mr. SHERMAN. Copyright law is what the courts say it is. So far, to the extent that the courts have spoken, that wouldn't be the case. This is just something that is developing. The only case law on this subject has come out on the side of the IAP's.

The CHAIRMAN. Well, let me ask you this. Would you be in favor of legislation to codify the knowledge requirement for infringement on the part of the service provider?

Mr. SHERMAN. Well, it depends on what you mean by——

The CHAIRMAN. Why not clarify the law along the lines that Mr. Burton has suggested in his testimony?

Mr. SHERMAN. Well, I think our concern about the knowledge standard is that we don't want to have the total burden shifted onto the content providers to monitor everything that is out there and highlight all the pirated sites. I think the fact is that there is a "reasonable man" provision and if an ISP has a site that says "steal this software illegally for free," there should be some obligation on that ISP to say, well, you know, we ought to look at that site and see what is going on there. And so I think that there is a constructive standard here and the straight notice and takedown, with all the responsibility on the side of the content providers, is unworkable.

The CHAIRMAN. Well, let me just say that I am told that technology may exist which, if content providers and service providers were able to agree on a market protocol, would allow operators of networks and content providers to better detect and deter third-party digital transmissions which infringe on copyright.

One might consider whether, assuming leading service providers, OEMs and content providers were empowered by Congress to do so, the information technology industry could develop a private protocol which would be implemented across the industry spectrum whereby liability for third-party infringement is substantially limited and ensuring that the costs of developing and implementing such a program are borne by everybody, by all.

Mr. SHERMAN. Mr. Chairman, I think that the possibility of a technological solution is the holy grail that we are all looking for, and we think it can exist. But if the IAPs got their way and got this exemption from liability, then what would be their incentive to deploy the technology? Why would they have any interest in helping us any longer once they no longer face any risk of liability? We need that to help level the playing field so that they will cooperate with us in trying to deter infringements.

The CHAIRMAN. Well, if we could get that kind of a solution, it would be market-driven rather than Government-mandated and it would, in my opinion——

Mr. OAKLEY. Mr. Chairman, may I——

The CHAIRMAN. Let me just finish these thoughts that I have. It would, in my opinion, stimulate a more vigorous investment in the Internet by all sides.

Mr. Oakley.

Mr. OAKLEY. Thank you. There has been a lot of talk and a lot of support for the technology-driven solution, but there is also a worry that the technology-driven solution can go too far, that it can be too absolute, because we do have certain limits built into the Copyright Act now that protect the rights of users and those have to do with fair use and a host of other possibilities.

The technology solution effectively eliminates all fair use, or could potentially eliminate all fair use in any other of the limits that have been built into the copyright system. So the technology solution has the perhaps unintended effect, or perhaps intended effect of totally changing the balance that currently exists in copyright law.

The CHAIRMAN. Well, let me turn again to the service providers. It seems to me that the content providers make a valid point when they ask what incentive the service providers will have to continue cooperating with them to take down pirated sites. It seems realistic to assume that not all service providers are as ethical or as upright as you folks represented here today, or as responsible. Could you comment on that?

Mr. NEEL. Well, Mr. Chairman, as I mentioned before, the telephone companies have every incentive to solve this problem because we are also content owners. We have massive amounts of data, directories, all kinds of software, that we want and intend to protect as well. So we have every incentive to do that.

But let me just give you a situation here. Even if you had the technological holy grail, you would not be in a situation where the Internet service provider or the telephone company would be able to know if the transmission of some material has been authorized. If Paul McCartney comes into your office and says, "I just heard my song 'Yesterday' sent over the Internet and I want you to shut that down"—well, you know that song; I am sure it is one of your favorites—you would say, well, yes, absolutely, Paul McCartney wrote that song.

Well, then, 30 minutes later, you shut it down and Michael Jackson calls you and says, "Wait a minute. I sold the rights to that to America Online." You don't have any way of knowing that, so under any technological solution there is going to be a severe difficulty in a carrier or Internet service provider being able to determine if that transmission was authorized. So it has to be the initial responsibility of the content owner to identify when the transmission is unauthorized. Then it is our responsibility to shut it down.

The CHAIRMAN. I have other questions. I will submit them in writing. I might ask a couple more if we have enough time. We have to finish right at 11:30 because of the invocation of the 2-hour rule.

[The questions of Senator Hatch are located in the appendix.]

The CHAIRMAN. Senator Ashcroft.

Senator ASHCROFT. Thank you, Mr. Chairman. I hesitate to say anything, not having been raised or ever resided in Utah. [Laughter.]

I have virtually no relationship with Georgetown at all. I did root against Georgetown in a couple of basketball games.

The CHAIRMAN. Actually, we Mormons have had a lot of relationship with Missouri through the years, I have to say, and we do appreciate your and Kit Bond's revocation of the former Governor's extermination order.

Senator ASHCROFT. Well, I was delighted to have been the attorney general at the time that happened. Incidentally, I was attorney general of the State of Missouri when I filed an amicus brief in *Sony Corporation of America* v. *Universal Studios*, in the early 1980's. The Supreme Court there rejected the claims of owners of copyrights on television programs brought copyright infringement actions against manufacturers of VCR's. It was a time when the content industry thought that no American should be able to have a VCR because of the threat that it rendered.

It seems that we have gotten over that. We have understood that technology is not the enemy of the American people, and not really the enemy of the industry either. The industry has prospered. Now, there are a good many movies that don't make it at the box office, but make it well when they put it out for the home video market. I think that we have to be careful that we move to do what we can to curtail illegal activity, but we don't stifle the technology which can build a bridge to the next generation of opportunity in this country.

I want to thank you, Mr. Chairman, for this morning's discussion. It is of great importance and it is important to the country, to consumers, to the growth of electronic commerce on the Internet. Any effort to address the copyright protection of material on the Internet must protect everyone who stands to benefit from the expansion of electronic commerce.

The content community has to be highly regarded—and I understand completely the need for the protection—but so do the online service providers, and those who use the Internet or information in a digital format for education, entertainment, research, and others. Their opportunity to speak and to learn needs to be protected.

I had the privilege yesterday of introducing S. 1146, the Digital Copyright Clarification and Technology Education Act of 1997, which I believe incorporates the interests of all of these groups and strikes a balance between protecting the economic value of creative works and ensuring that those works are widely available.

I want to emphasize that this proposed legislation is the beginning of a discussion, a departure rather than a destination, and I would welcome the opportunity to collaborate with the content community and with provider communities and with members of the public and with educational institutions.

The capacity, for instance, of scholars to use material for limited quotations and critical evaluations—like they do in scholarly works that are in print now—is not available in the digital world. I don't think we should put every scholar at risk just because they are involved digitally instead of involved in print. It is time for us to make sure that scholars have a clear opportunity to have the same kind of freedom of speech and comment in digital format that they have in print. That is not a scary thing. That is the kind of thing upon which America has marched forward and hasn't threatened—in any measure, in the past, in the print format—our ability to be a leader.

That is our objective, not that we file this bill as a destination, but as a beginning point, a place of discussion, that not only would seek to protect the content community or the transmission community or the provider community, but the public as well.

The bill would accomplish many goals, all of which need to be a part of the solution. For example, the bill would take the current provisions in copyright law that authorize distance education and update them for the digital age. Right now, there are a lot of people involved in distance education in this country. If they use digital technology in transmitting the signal, then they are infringing the copyright law, but they are not infringing it if they use analog technology. That is an anomaly and we need to address that. The idea that there is no need to address that, to me, is an overstatement.

I don't think we need laws to address everything in the world, but I think this situation needs a solution. I hate the thought that a number of our educators who are doing things and not infringing copyrights in the process in any traditional sense, but merely by virtue of their choice of a digital format, thier actions somehow become criminal. That is not right.

In addition, the bill would protect those who transfer information via the Internet without exercising control over the content. Mr. Sherman indicated that bookstores are in the same position as Internet providers. Frankly, in transmitting a document over the Internet, you have to disassemble it and reassemble it, and that is a technical republication. I don't know of a single activity that a bookstore engages in that involves it in technical republications. I have never seen a bookstore reprint books on the premises.

Mr. **SHERMAN**. It is the distribution right, sir.

Senator **ASHCROFT**. Well, it seems to me that there are differences between these formats. If we are going to move into the 21st century, I am not sure that we don't need to have some recognition of the new technology in the way we handle these issues. That is what we are looking for.

The legislation would give copyright holders a rapid response system to use to protect their copyrights from abuse or piracy. Some of you were asking why would an Internet provider have a reason to cooperate with a content owner. Well, under the legislation that is proposed, there would be a legal responsibility to cooperate. I think we can provide an incentive in that respect that is pretty clear, unmistakable. We can just simply say you are operating illegally unless you respond constructively. Finally, the legislation establishes a standard for liability based on an individual's conduct rather than restricting the advance of new technology.

I understand that there would be those who disagree with many of the aspects of the legislation. I hope that we can work on those disagreements to craft a balanced, credible approach protecting copyright holders and the general public in equal measure. I welcome an opportunity to be conversant with all the folks, and to the extent that any of you have felt that there has been inadequate conversation, I would open my door. Many of us on the committee, myself included, are copyright holders. Many of us have some real interest in the outcome of this debate.

At the end of the day, I hope that the balance in copyright law is maintained. I think we have done a good job in this country, but we are confronting new challenges and I hope we do not forget the most important group in this debate, the end users of online and digital technology.

I want to thank the chairman for conducting the hearing and allowing me the extra seconds at the end of my time to finish these comments.

The CHAIRMAN. Thank you, Senator Ashcroft.

Let me just end this hearing, because we have to end it, with this comment. The copyright liability of service providers, to me, is a very complicated issue, and to you I am sure it is, too. But I am confident that with good will on all sides, we can maybe work it out. So I am asking each of you to work with me and members of this committee to try and resolve this, and with each other. Can we get that kind of cooperation?

Mr. VRADENBURG. Absolutely.

Mr. BURTON. Yes, sir.

The CHAIRMAN. Everybody is in agreement that we can work together and try to come up with a solution that we can all agree on, or at least basically all agree on.

I am also concerned about the *LaMacchia* case. Mr. Neel in his testimony, and Mr. Burton, as I recall, urged us to enact legislation to deal with the lack of criminal penalties for infringement that did not involve commercial advantage or private financial gain, as illustrated in the *LaMacchia* case.

Let me ask you this, Mr. Neel. If we can do that, would you support such a bill so long as it addressed the concerns of the service providers?

Mr. NEEL. I believe so. We would like to work with you on that.

The CHAIRMAN. All right. Well, I think those are good commitments, and what we are going to do is see what we can do to resolve this. I am getting more and more up on it all the time. It is complex, it is difficult. You have to admit you folks have had a very difficult time getting together, so we are going to have to get together and butt heads and see what we can do to bring this to a successful conclusion. I do think we need to ratify the WIPO treaties, so hopefully we can do that. So I am willing to do it. We will be calling some meetings and I hope all of you will cooperate and let us see if we can get it done.

This has been a very helpful hearing today and we will look at and reread all your statements and we will have questions. The ranking member has reserved his right to submit questions to you. I hope that you will answer them expeditiously, and then as soon as we get these questions answered, we will sit down and see what the parameters are and what we can do. Hopefully, we can put something together that will be mutually beneficial for all of you.

With that, we will adjourn until further notice.

[Whereupon, at 11:30 a.m., the committee was adjourned.]

APPENDIX

PROPOSED LEGISLATION

II

105TH CONGRESS
1ST SESSION

S. 1146

To amend title 17, United States Code, to provide limitations on copyright liability relating to material on-line, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 3, 1997

Mr. ASHCROFT introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 17, United States Code, to provide limitations on copyright liability relating to material on-line, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Digital Copyright Clarification and Technology Education Act of 1997".

TITLE I—DIGITAL COPYRIGHT CLARIFICATION

SEC. 101. PURPOSES.

The purposes of this Act are—

(1) to clarify the application of copyright law in the unique environment of Internet and on-line communication;

(2) to foster the continued growth and development of the Internet as a means of communication and commerce, including the lawful distribution of intellectual property;

(3) to protect the rights of copyright owners in the digital environment;

(4) to clarify that providing network services and facilities with respect to the transmission of electronic communications of another person does not result in liability under the Copyright Act;

(5) to clarify that Internet and on-line service providers are not liable for third-party copyright infringements unless they have received notice in compliance with this Act of the infringing material and have a reasonable opportunity to limit the third-party infringement; and

(6) to create incentives for the rapid elimination of infringing material residing on an electronic communications system or network without litigation.

SEC. 102. CLARIFICATION OF LIABILITY.

(a) IN GENERAL.—Chapter 5 of title 17, United States Code, is amended by adding after section 511 the following new section:

"§ 512. Liability relating to material on the Internet and on-line

"(a) MATERIAL BEING TRANSMITTED THROUGH AN ELECTRONIC COMMUNICATIONS SYSTEM OR NETWORK.—

"(1) NETWORK SERVICES WITH RESPECT TO THE TRANSMISSION OF ELECTRONIC COMMUNICATIONS.—A person shall not be liable for direct, vicarious or contributory infringement of copyright arising out of providing electronic communications network services or facilities with respect to a copyright infringement by a user. A person shall be considered to provide "network services and facilities" when such person transmits, routes or provides connections for material on behalf of a user over an electronic communications system or network controlled or operated by or for the person, including intermediate and transient storage, the processing of information, and the provision of facilities therefor, if—

"(A) the provision of services is for the purpose of managing, controlling or operating a communications system or network, supplying local access, local exchange, telephone toll, trunk line, private line, or backbone services, including network components or functions necessary to the transmission of material contained in electronic communications carried over those services; or

"(B) the transmission of material over the system or network on behalf of a user does not involve the generation or material alteration of content by the person.

"(2) PRIVATE AND REAL-TIME COMMUNICATION SERVICES.—A person shall not be liable for direct, vicarious or contributory infringement of copyright arising from supplying to another—

"(A) a private electronic communication, including voice messaging or electronic mail services, or any other communication for which such person lacks either the technical ability or authority under law to access or disclose such communication to any third party in the normal course of business; or

"(B) real-time communication formats, including chat rooms, streamed data, or other virtually simultaneous transmissions.

"(3) INFORMATION LOCATION TOOLS.—No person shall be liable for direct, vicarious or contributory infringement of copyright arising out of supplying a user of network services or facilities with—

"(A) a site-linking aid or directory, including a hyperlink or index;

"(B) a navigational aid, including a search engine or browser; or

"(C) the tools for the creation of a site-linking aid.

"(b) MATERIAL RESIDING ON A SYSTEM OR NETWORK.—

"(1) COOPERATIVE PROCEDURE FOR EXPEDITIOUS RESPONSE TO CLAIMS OF INFRINGEMENT.—A person shall not be liable for direct, vicarious or contributory infringement of copyright arising out of the violation of any of the exclusive rights of the copyright owner by another with respect to material residing on a system or network used in conjunction with electronic communications that is controlled or operated by or for the person, unless upon receiving notice complying with paragraph (b)(3), the person fails expeditiously to remove, disable, or block access to the material to the extent technologically feasible and economically reasonable for a period of ten days, or until receiving a court order concerning the material, whichever is less.

"(2) Paragraph (b)(1) shall apply where such person—

"(A) did not initiate the placement of the material on the system or network;

"(B) did not determine the content of the material placed on the system of network; and

"(C) did not contract for placement of the specific material on the system or network by another person in order to provide that content as part of the person's service offering.

"(3) A person shall not be deemed to have notice that material residing on a system or network used in conjunction with electronic communications is infringing unless the person—

"(A) is in receipt of a notification that the particular material is infringing. Such notification shall:

"(i) pertain only to allegedly infringing material that resides on a system or network controlled or operated by or for the person;

"(ii) be submitted in accordance with directions displayed on the person's system or network indicating a single place or person to which such notifications shall be submitted;

"(iii) be signed, physically or electronically, by an owner of an exclusive right that is allegedly infringed, or by a person authorized to act on such owner's behalf;

"(iv) provide an address, telephone number, and electronic mail address, if available, at which the complaining party may be contacted in a timely manner;

"(v) describe the material claimed to be infringing, including information reasonably sufficient to permit the person expeditiously to identify and locate the material;

"(vi) provide reasonable proof of a certificate of copyright registration for the material in question, a filed application for such registration, or a court order establishing that use of the material in the manner complained of is not authorized by the copyright owner or the law;

"(vii) contain a sworn statement that the information in the notice is accurate, that the complaining party is an owner of the exclusive right that is claimed to be infringed or otherwise has the authority to enforce the owner's rights under this title, and that the complaining party has a good faith belief that the use complained of is an infringement;

"(viii) be accompanied by any payment that the Register of Copyrights determines is necessary to deter frivolous and de minimis notices; and

"(B) A person who is an employee or agent of a nonprofit educational institution, library or archives, acting within the scope of his employment, or such an educational institution, library or archives itself, shall not be deemed to have notice under subparagraph (A) if that person reasonably believed (i) that the allegedly infringing use was a fair use under Sec. 10 or (ii) was otherwise lawful; and

"(C) The Register of Copyrights may, by regulation, establish guidelines identifying additional information to be included in the notice and shall issue a standard notice form in both electronic and hard copy formats, which complies with this paragraph, but failure of a party to provide any such additional information, or failure to use any issued form, shall not invalidate the notice.

"(4) MISREPRESENTATIONS AND REDRESS FOR WRONGFUL NOTIFICATIONS.—Any person who materially misrepresents that material on-line is infringing in a notice described in paragraph (b)(3)(A), shall be liable in a civil action that may be brought in an appropriate United States district court or State court for statutory damages of not less than $1,000, and any actual damages, including costs and attorneys' fees, incurred by—

"(A) the actual copyright owner or the alleged infringer arising out of the disabling or blocking of access to or removal of such material; or

"(B) any person who relies upon such misrepresentation in removing, disabling, or blocking access to the material claimed to be infringing in such notice.

"(5) LIMITATION ON LIABILITY BASED UPON REMOVING, DISABLING, OR BLOCKING ACCESS TO IN-

FRINGING MATERIAL.—A person shall not be liable for any claim based on that person's removing, disabling, or blocking access for a period of ten days, or until the person receives a court order concerning the material, whichever is less, to material residing on a system or network used in conjunction with electronic communications that is controlled or operated by or for that person in response to notice pursuant to paragraph (b)(3)(A) that the material is infringing, whether or not the material is infringing.

"(6) OTHER DEFENSES NOT AFFECTED.—A person's removing, disabling, or blocking access to material residing on a system or network used in conjunction with electronic communications that is controlled or operated by or for that person, pursuant to paragraph (1), or the failure to do so, shall not adversely bear upon the consideration by a court of any other issue pertaining to liability or remedy, including any other limitation on liability established in paragraph (a), any other applicable defense, any claim that the service provider's alleged conduct is not infringing, or whether or not such conduct is willful or innocent.".

(b) CONFORMING AMENDMENT.—The table of sections for chapter 5 of title 17, United States Code, is amended at the end the following:

"512. Liability relating to material on the Internet and on-line".

TITLE II—TECHNOLOGY FOR TEACHERS AND LIBRARIANS

SEC. 201. SHORT TITLE.

This title may be cited as the "Technology for Educators and Children (TECh) Act".

SEC. 202. FAIR USE.

(a) TRANSMISSIONS.—The first sentence of section 107 of title 17, United States Code, is amended by inserting after "or by any other means specified in that section," the following: "and by analog or digital transmission,".

(b) DETERMINATION.—Section 107 of title 17, United States Code, is amended by adding at the end thereof the following: "In making a determination concerning fair use, no independent weight shall be afforded to—

"(1) the means by which the work has been performed, displayed or distributed under the authority of the copyright owner; or

"(2) the application of an effective technological measure (as defined under section 1201(c)) to the work.".

SEC. 203. LIBRARY EXEMPTIONS.

Section 108 of title 17, United States Code, is amended—

(1) by striking "Notwithstanding" at the beginning of subsection (a) and inserting: "Except as otherwise provided and notwithstanding";

(2) by inserting after "copyright" in subsection (a)(3): "if such notice appears on the copy or phonorecord that is reproduced under the provisions of this section";

(3) in subsection (b) by—

(A) deleting "a copy or phonorecord" and inserting in lieu thereof: "three copies or phonorecords"; and

(B) deleting "in facsimile form", and

(4) in subsection (c) by—

(A) deleting "a copy or phonorecord" and inserting in lieu thereof: "three copies or phonorecords";

(B) deleting "in facsimile form"; and

(C) inserting "or if the existing format in which the work is stored has become obsolete," after "stolen,".

SEC. 204. DISTANCE EDUCATION.

(a) TITLE CHANGE.—The title of section 117 of title 17,

United States Code, is amended to read as follows:

"§ 110. Limitations on exclusive rights: Exemption of certain activities";

(b) PERFORMANCE, DISPLAY AND DISTRIBUTION OF A WORK.—Section 110(2) of title 17, United States Code, is amended to read as follows:

"(2) performance, display or distribution of a work, by or in the course of an analog or digital transmission, if—

"(A) the performance, display or distribution is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution;

"(B) the performance, display or distribution is directly related and of material assistance to the teaching content of the transmission; and

"(C) the work is provided for reception by—

"(i) students officially enrolled in the course in connection with which it is provided; or "(ii) officers or employees of governmental bodies as part of their official duties or employment;"

(c) EPHEMERAL RECORDINGS OF WORKS.—Section 112(b) of title 17, United States Code, is amended by deleting "transmit a performance or display of" and inserting in lieu thereof: "perform, display or distribute".

SEC. 205. LIMITATIONS ON EXCLUSIVE RIGHTS.

(a) TITLE.—The title of section 117 of title 17, United States Code, is amended to read as follows:

"§ 117. Limitations on exclusive rights: Computer programs and digital copies";

(b) DIGITAL COPIES.—Section 117 of title 17, United States Code, is amended by inserting "(a)" before "Notwithstanding" and inserting the following as a new subsection (b):

"(b) Notwithstanding the provisions of section 106, it is not an infringement to make a copy of a work in a digital format if such copying—

"(1) is incidental to the operation of a device in the course of the use of a work otherwise lawful under this title; and

"(2) does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.".

TITLE III—WIPO TREATY IMPLEMENTATION

SEC. 301. WIPO IMPLEMENTATION

Title 17 of the United States Code is amended by adding the following sections:

"§ 1201. Circumvention of certain technological measures

"(a) CIRCUMVENTION CONDUCT.—No person, for the purpose of facilitating or engaging in an act of infringement, shall engage in conduct so as knowingly to remove, deactivate or otherwise circumvent the application or operation of any effective technological measure used by a copyright owner to preclude or limit reproduction of a work or a portion thereof. As used in this subsection, the term 'conduct' does not include manufacturing, importing or distributing a device or a computer program.

"(b) CONDUCT GOVERNED BY SEPARATE CHAPTER.—Notwithstanding subsection (a), this section shall not apply with respect to conduct or the offer or performance of a service governed by a separate chapter of this title.

"(c) DEFINITION OF EFFECTIVE TECHNOLOGICAL MEASURE.—As used in this section, the term 'effective technological measure' means information included with or an attribute applied to a transmission or a copy of a work in a digital format, or a portion thereof, so as to protect the rights of a copyright owner of such work or portion thereof under chapter one of this title and which—

"(1) encrypts or scrambles the work or a portion thereof in the absence of access information supplied by the copyright owner; or

"(2) includes attributes regarding access to or recording of the work that cannot be removed without degrading the work or a portion thereof.

"§ 1202. Integrity of copyright management information

"(a) FALSE COPYRIGHT MANAGEMENT INFORMATION.—No person shall knowingly provide copyright management information that is false, or knowingly publicly distribute or import for distribution copyright management information that is false, with intent to induce, facilitate, or conceal infringement.

"(b) REMOVAL OR ALTERATION OF COPYRIGHT MANAGEMENT INFORMATION.—No person shall, without authority of the copyright owner or other lawful authority, knowingly and with intent to mislead or to induce or facilitate infringement—

"(1) remove or alter any copyright management information;

"(2) publicly distribute or import for distribution a copy of phonorecord containing copyright management information that has been altered without authority of the copyright owner or other lawful authority; or

"(3) publicly distribute or import for distribution a copy or phonorecord from which copyright management information has been removed without authority of the copyright owner or other lawful authority:

Provided, That the conduct governed by this subsection does not include the manufacturing, importing or distributing of a device.

(c) DEFINITION OF COPYRIGHT MANAGEMENT INFORMATION.—As used in this chapter, the term 'copyright management information' means the following information in electronic form as carried in or as data accompanying a copy of phonorecord of a work, including in digital form:

"(1) The title and other information identifying the work, including the information set forth in a notice of copyright;

"(2) The name and other identifying information of the author of the work;

"(3) The name and other identifying information of the copyright owner of the work, including the information set forth in a notice of copyright;

"(4) Terms and conditions for uses of the work;

"(5) Identifying numbers or symbols referring to such information or links to such information; and

"(6) Such other identifying information concerning the work as the Register of Copyrights may prescribe by regulation:

Provided, That the term 'copyright management information' does not include the information described in section 1002, section 1201(e), or a chapter of this title other than chapters one through nine of this title: *Provided further,* That, in order to assure privacy protection, the term 'copyright management information' does not include any personally identifiable information relating to the user of a work, including but not limited to the name, account, address or other contact information of or pertaining to the user.

"§ 1203. Civil remedies

"(a) CIVIL ACTIONS.—Any person aggrieved by a violation of section 1201(a) or 1202 may bring a civil action in an appropriate United States district court against any person for such violation.

"(b) POWERS OF THE COURT.—In an action brought under subsection (a), the court—

"(1) may grant a temporary and a permanent injunction on such terms as it deems reasonable to prevent or restrain a violation;

"(2) may grant such other equitable relief as it deems appropriate;

"(3) may award damages pursuant to subsection (c);

"(4) may allow the recovery of costs by or against any party other than the United States or an officer thereof; and

"(5) may award a reasonable attorney's fee to the prevailing party.

"(c) AWARD OF DAMAGES.—

"(1) IN GENERAL.—If the court finds that a violation of section 1201(a) or 1202 has occurred, the complaining party may elect to either actual damages as computed under paragraph (2) or statutory damages as computed under paragraph (3).

"(2) ACTUAL DAMAGES.—The court may award to the complaining party the actual damages suffered by him or her as a result of the violation, and any profits of the violator that are attributable to the violation and are not taken into account in computing the actual damages, if the complaining party elects such damages instead of statutory damages at any time before final judgment is entered.

"(3) STATUTORY DAMAGES.—(A) The court may award to the complaining party statutory damages for each violation of section 1201(a) of not less than $250 or more than $2,500, as the court considers just, if the complaining party elects such damages instead of actual damages at any time before final judgment is entered.

"(B) The court may award to the complaining party statutory damages for each violation of section 1202 of not less than $500 or more than $20,000, as the court considers just, if the complaining party elects such damages instead of actual damages at any time before final judgment is entered.

"(4) REPEATED VIOLATIONS.—In an case in which the court finds that a person has violated section 1201(a) or 1202 within three years after a final judgment against that person for another such violation was entered, the court may increase the award of damages to not more than double the amount that would otherwise be awarded under paragraph (2) or (3), as the court considers just.

"(5) INNOCENT VIOLATION.—The court may reduce or remit altogether the total award of damages that otherwise would be awarded under paragraph (2) or (3) in any case in which the violator sustains the burden of proving, and the court finds, that the violator was not aware and had no reason to believe that its acts constituted a violation of section 1201(a) or 1202.".

SEC. 302. CONFORMING AMENDMENTS.

(a) TABLE OF SECTIONS.—The table of sections for chapter 1 of title 17, United States Code, is amended by—

(1) revising the item relating to section 110 to read as follows:

"110. Limitations on exclusive rights: Exemption of certain activities.";

and

(2) revising the item relating to section 117 to read as follows:

"117. Limitations on exclusive rights: Computer programs and digital copies.".

(b) TABLE OF CHAPTERS.—The table of chapters for title 17, United States Code, is amended by adding at the end the following:

"12. Copyright Protection and Management Systems 1201".

SEC. 303. EFFECTIVE DATES.

(a) IN GENERAL.—Sections one through seven and section 9(a) of this Act, and the amendments made by sections one through seven and section 9(a) of this Act, shall take effect on the date of enactment of this Act.

(b) WIPO Treaties.—Section 8 and section 9(b) of this Act, and the amendments made by section 8 and section 9(b) of this Act, shall take effect on the date on which both the World Intellectual Property Organization Copyright Treaty and the World Intellectual Property Organization Performances and Phonograms Treaty have entered into force with respect to the United States.

QUESTIONS AND ANSWERS

RESPONSES OF FRITZ E. ATTAWAY TO QUESTIONS FROM SENATOR HATCH

Question 1. Mr. Sherman made the point in his testimony that bookstores, record retailers, magazine publishers, TV broadcasters, and scores of others are all technically at risk of committing or contributing infringement by virtue of their day-to-day business operations, yet they continue to do business. Yet some would argue that service providers are unlike these other commercial entities in that they have little say in choosing their suppliers and must deal with a higher volume of content that remains in flux from day to day. In your view, are service providers analogous to these traditional retailers and distributors of copyrighted materials and should they operate under the same liability regimes?

Answer 1. Yes. Bookstores are a particularly apt analogy. A bookstore is likely to have thousands, perhaps tens of thousands of books, millions of pages of printed material, virtually all of it copyrighted, and the store owner could not possibly inspect every page of every book to insure that no infringing material is present. Bookstores, like OSPs and ISPs, are subject to the standards and obligations imposed by the copyright law to protect copyright owners. And bookstores, like OSPs and ISPs, have not been subject to a flood of infringement suits or debilitating damage awards.

Question 2. Mr. Sherman also mentioned in his testimony that there are any number of popular search engines to identify sites that contain sound recordings. Doesn't this suggest that record companies and other content providers could use such engines to police the Internet themselves and go after pirate sites? In other words, why isn't technology the solution as well as the problem?

Answer 2. Technology certainly is part of the solution, a very big part, but it is not the entire solution. Technology can provide the tools to combat Internet piracy, but it cannot substitute for personal, or corporate, responsibility. Everyone in the business of creating, delivering and using copyrighted works must share the responsibility of preventing theft. There is no evidence that existing law assigns that responsibility unfairly or unwisely.

We believe existing law provides the necessary incentive for OSP/ISPs to cooperate with content owners to combat Internet piracy. Technology will likely provide the tools by which OSP/ISPs and content owners, working together, develop and implement efficient and effective methods to discover and eliminate infringing activities. Search engines, for instance, may be developed to identify infringing material. But it will require a cooperative effort between OSP/ISPs and copyright owners to make the technology work. The Internet is simply too vast for any technology to police the system effectively without some help from service providers.

Question 3. Utah has upwards of 60 small Internet service providers. These are mostly "mom and pop" operations, very different from the telephone companies and America Online. They tell me that if they were sued for copyright infringement, they would be forced out of business. Even if they wanted to police their systems, they claim they would not know how to recognize a pirated work. For this reason they favor "notice and take-down." Why can't we give them a safe-harbor?

Answer 3. The elegance of present law is its flexibility. Judges can take into account the size, resources and abilities of alleged contributory or vicarious infringers. To my knowledge, no "innocent" OSP/ISP, large or small, has been found liable for infringement. Certainly, no "mom and pop" ISP has been forced out of business as the result of an infringement suit.

If the driver of an OSP van injures someone while on the job, the OSP, big or small, may be held liable. I believe such liability is in the public interest because it encourages employers to exercise some reasonable standard of care in hiring and supervising employees. The present copyright law also requires a reasonable standard of care with respect to copyrighted works. There is no evidence that either the tort law or the copyright law is imposing an unreasonable hardship on "mom and pop" businesses.

As discussed in answer to the previous question, we expect technology to ease the burden on all parties, large and small, to combat piracy. We do not want to place an unnecessary or unfair burden on anyone. What we want is for everyone to work with us to control Internet piracy.

RESPONSES OF FRITZ E. ATTAWAY TO QUESTIONS FROM SENATOR LEAHY

Question 1. **What would be the impact internationally of the United States adopting legislation limiting the liability or exempting from liability online service providers of copyright infringement?**

Answer 1. A limitation of liability or exemption from liability in the United States would likely be followed, and embellished upon, by many other countries around the world. If the largest producer of copyrighted works in the world does not protect its copyright owners, we hardly could expect other nations, with less of an economic interest at stake, to give U.S. copyright owners greater protection than they receive at home.

Question 2. Technology and market practices are evolving rapidly. Does legislation limiting the liability of online service providers or Internet access providers pose the risk of becoming obsolete in a short time, or freezing industry practices and preventing them from evolving as efficiently as possible?

Answer 2. Yes, absolutely. As I stated in response to an earlier question, the elegance of existing law is its flexibility. Even if we could fashion today a set of detailed standards of reasonable conduct for OSP/ISPs, they would be out of date by the time a new law could become effective. Both technology and marketing practices are evolving with lightning speed. It would be folly to develop precise standards of liability based on today's technology and businesses, and expect them to even be relevant, much less effective, in the technological and business environment of tomorrow.

Question 3. Have any technical means been developed to protect copyright on the Internet by flagging either copyrighted material or infringing material?

(a) If so, are any of these systems capable of being implemented without the cooperation of the OSP/ISPs?

(b) If the liability of OSP and ISPs is limited for copyright infringement, what effect if any do you anticipate this would have on their willingness and/or incentive to cooperate in developing and implementing technical means to protect copyright online?

Answer 3. Technical methods, like watermarking, are being developed to identify copyrighted material. To the best of my knowledge, these means would require some degree of cooperation from OSP/ISPs to be implemented effectively. The more OSP/ISPs are insulated from copyright liability, the less incentive they will have to cooperate with copyright owners to protect their works. In fact, the "knowledge test" advocated by many OSP/ISPs would create an incentive "not to know." That is, this test would reward those who take the least initiative to detect infringements.

Question 4. What are copyright owners doing today to prevent infringement of their creative works on the Internet?

Answer 4. As I stated in my testimony, Internet piracy is not yet a problem for movies because today's technology cannot handle the mass of digital information contained in a feature motion picture. However, there are mail order pirates who conduct business over the Internet and we maintain an extensive Internet monitoring program to detect and prosecute these pirates.

Question 5. What technological means, if any, are available today for service providers to identify infringing copies, without having to monitor the content of transmissions?

Answer 5. I am not familiar with the technological means at the disposal of OSP/ISPs.

Question 6. Have the courts applied the concept of fair use and other exemptions from liability in the copyright law in essentially the same manner in the online environment as they have in the print environment? If not, please cite the case or cases in which these concepts and exemptions have not been applied consistently in the online environment.

Answer 6. To the best of my knowledge, no court has applied these concepts differently in the online environment than in the print environment.

Question 7. Current copyright laws exempt parties from liability in certain circumstances. For example, section 111 of Title 17, exempts "passive carriers" who retransmit broadcast signals containing copyright programming when the carrier "has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission" and whose relevant activities "consist solely of providing wires, cables or other communications channels for the use of others."

(a) Are OSPs and ISPs in a similar position as the "passive carriers" already granted an exemption under our copyright laws?

(b) What is your view of crafting a similarly limited exemption specifically for OSPs or ISPs? Would that be enough and, if not, could you explain why?

Answer 7. The "passive carrier exemption" in 17 U.S.C. Sec. 111(a)(3) relates to the secondary retransmission of television and radio signals and OSP/ISPs that meet the requirements of this provision would appear to be eligible. I would not support a broadening of this exemption for OSP/ISPs because there is no indication that activities that "consist solely of providing wires, cables, or other communications channels for the use of others" have resulted in infringement liability under present law.

Question 8. Part of the negotiations on this issue that occurred in the House last year revolved around a code of conduct requiring that a service provider adhere to certain operating practices before it could avail itself of any limitations on copyright liability. This code of conduct would have required, among other things, that OSPs inform user of their obligations to respect copyright rights and terminate the access of known and repeat copyright infringers.

(a) Is this code of conduct being followed by online service providers?

(b) If so, what parts or all of it?

Answer 8. This question can only be answered by service providers.

Question 9. What are your views of the "notice" and "take-down" procedures discussed in the negotiations led by Congressman Goodlatte last year?

Answer 9. "Notice" and "take-down" procedures could be an important part of a reasonable sharing of responsibilities between OSP/ISPs and content providers. However, they should by no means be the limit of responsibilities. If there is no liability without "notice," there is no incentive on the part of the OSP/ISP to take any initiative, no matter how simple or effortless, to prevent infringements. Such a broad limitation would be counterproductive. Moreover, "take-down" is not always a sufficient response. If the pirate can merely change locations on the Internet, mere "take-down" is only an inconvenience.

Question 10. Would a mandatory notice and take-down procedure violate the "no formality" requirement of the TRIPS agreement? Please explain why.

Answer 10. Yes. If effective copyright protection were conditioned upon a "notice" requirement, this would be a violation of the prohibition on "formalities" in the Berne Convention and a violation of our TRIPS obligations.

Question 11. The recent court cases of *Microsoft* v. *Ticketmaster* and *TotalNews* have raised the issue of whether contributory copyright infringement liability applies to hyperlinking. In your view, does hyperlinking pose any risk of contributory copyright infringement liability if the site which is linked contains infringing material? If so, what effect, if any, do you think this will have on the freedom of users to hyperlink?

Answer 11. I do not have sufficient technical knowledge to answer this question.

Question 12. In the physical world, if someone publishes a directory that references or cites to a work that infringes a copyright, my understanding is that the directory itself is not an infringing work nor is the author of the directory subject to liability for copyright infringement.

(a) Is my understanding correct?

(b) Should hyperlinking be treated any differently?

Answer 12. Yes, if the facts are limited to those given in the question. However, if the directory is a directory of infringing sites or is accompanied by information that encourages or facilitates infringing activity, and the author receives a benefit as a result, I believe the answer would be different.

Question 13. Please describe generally what happens now when your company, or member companies, discover an electronic bulletin board service or an Internet Web site with pirated works?

Answer 13. We work with service providers to identify the pirate and/or take down the infringing material. To the best of my knowledge, no MPAA member company has filed an infringement action against an Internet service provider.

Question 14. What is the evidence showing that our current copyright laws are making the growth of the Internet suffer?

Answer 14. There is no such evidence.

Question 15. Under what circumstances, if any, would an individual "browsing" the Web be subject to liability for copyright infringement?

Answer 15. The simple act of "browsing," without more, would not create liability.

Question 16. Several witnesses suggest that "innocent transmitters," or those who unwittingly distribute infringing material, should not be held liable for the copyright infringement initiated by others. Would this represent a significant change to the Copyright Act, which does not require culpable knowledge for imposition of liability, but instead provides for limited statutory damages or mitigation of damages?

Answer 16. It has been shown that today infringing material is being distributed over the Internet, and no "innocent transmitter" has been held liable under existing law.

Question 17. Are the online service providers and Internet access providers seeking an exemption from direct liability for copyright infringement or just from contributory or vicarious liability?

Answer 17. It appears that at least some of the service providers are seeking immunity from direct as well as contributory and vicarious liability.

Question 18. If OSPs are exempt from the universal service surcharge levied against telecommunications services because they do more than common carriers, should they at the same time be granted a special exemption from copyright liability on the grounds that they act just like a common carrier?

Answer 18. To do so would appear to allow OSPs to eat their cake and have it too.

Question 19. Should there be any difference in copyright infringement liability for online services provided by commercial providers and by universities or libraries?

Answer 19. All service providers should share some responsibility for preventing infringements. However, in certain circumstances courts might be justified in taking into account that the provider is a university or library.

Question 20. In the debate over whether Congress should create a new type of property protection for data bases, opponents argue that those who seek legislation bear a heavy burden of proving why legislation is necessary. Do you think that those who seek legislation limiting OSP/ISP liability have met their burden of proof?

(a) How has that burden been met any differently in this case than with those who see data base protection?

Answer 20. No evidence has been presented that supports the claim that existing law imposes unfair, unreasonable or burdensome requirements on OSP/ISPs.

Question 21. In 1993, the Ninth Circuit in *MAI* v. *Peak* decided that when a computer repair company turned on a computer to perform maintenance work, a copyright infringement occurred because the repair worker was not a licensed user of the software and caused a RAM copy of the software to be made. In the 104th Congress, the House—but not the Senate—passed a bill to respond to *MAI* v. *Peak,* and provide a limited exemption from copyright liability for copying a computer program "solely by virtue of the activation of a machine" in order to repair and maintain a computer. What is your view of such a limited exemption from copyright liability?

Answer 21. MPAA did not oppose the very narrowly crafted House bill.

Question 22. Nonprofit libraries are permitted under the copyright laws to lend computer software. Borrowers are unable to use the borrowed program without downloading it into the random access memory (RAM) of their computers so that they are able to read or use it on their computer.

(a) Does the making of a temporary copy in RAM implicate any rights of the copyright holder and, if so, what are the risks of copyright infringement liability on the part of the borrower?

(b) Should the liability for copyright infringement for borrowers of computer software be clarified and, if so, what would you recommend?

Answer 22. This question is not applicable to the motion picture industry.

Question 23. Many Internet browsers cache "locally" by storing recently visited Web pages in the user computer's RAM to save time and burden on the Internet infrastructure from having to access the actual site. Caching also occurs on the server level, called "proxy" caching, so that OSPs, may store the most frequently requested sites on their own computer. When a user seeks a particular site, the online provider delivers a copy from its own computers' memory rather than from the Web site in question. Caching is considered essential to the successful functioning of the Internet.

(a) Does "caching" implicate any rights of the copyright holder and, if so, what are the risks of copyright infringement liability on the part of the computer user or online service provider?

(b) Should the liability for copyright infringement for the automatic "caching" engaged in by computers be clarified and, if so, what would you recommend?

Answer 23. I am not aware of any judicial decisions on the matter of "caching," most likely because there has been no litigation involving "caching." As a general matter, I would not recommend that the law be "clarified" unless there is evidence of a problem that requires Congressional action.

RESPONSE OF FRITZ E. ATTAWAY TO A QUESTION FROM SENATOR THURMOND

Question 1. Many in the creative community in the early 1980's believed that the VCR would be harmful to the movie industry, but the VCR has turned out to be very positive for the industry. Similar claims are now being made about the potential harmful impact of the Internet. Why are you concerned that the impact of the Internet may be so different from the VCR?

Answer 1. The Internet, like the VCR did in the 1980's, may open up a whole new market for motion pictures. The motion picture industry is not opposed to the Internet. To the contrary, the motion picture industry is embracing the Internet with enthusiasm. We do oppose broad exemptions from copyright principles in the Internet environment that apply in other environments.

RESPONSE OF FRITZ E. ATTAWAY TO QUESTIONS FROM SENATOR GRASSLEY

Question 1. In your written testimony you state that "copyright owners must take the lead; our vigilance is absolutely essential in combating the growth of Internet-based piracy." What, specifically, do you think copyright owners should do to fight Internet-based piracy? What, technologically speaking, can copyright owners do to fight Internet piracy?

Answer 1. We should take, and we are taking, steps to monitor the Internet for infringing material. We should also seek the cooperation of OSP/ISPs, and in those instances when we have done so, I believe we have received their cooperation.

With regard to technology, we are working on measures such as encryption and watermarking that will help us protect our works. Technology will be a big part of the answer to Internet piracy, but not the entire answer. We need incentives for all Internet participants to assume some responsibility for fighting Internet piracy. The existing copyright law provides such incentives. We also need an effective deterrent against the manufacture and use of devices that circumvent our technological protection measures, which is why we support the WIPO Treaty implementation legislation.

Question 2. You represent a large, well-known association with many members and resources.

(a) What can the Motion Picture Association of America do to help its members fight copyright piracy, apart from working for legislation?

(b) Has there been any discussions about hands-on assistance from your organization?

(c) Do you help find or remove illegal information on the Internet?

(d) Is there any reason you could not help solve this problem?

(e) What specifically, has your organization done to help solve the problem of Internet policy?

Answer 2. As stated in answer to the previous question, the motion picture industry is taking steps to fight Internet piracy. MPAA spends over $20 million annually around the world in the fight against piracy, and more and more resources will be devoted to piracy in the electronic marketplace as it develops the capacity to distribute our motion pictures. We and other copyright owners must shoulder the major part of the burden of protecting our works from piracy. We do not seek relief from that obligation. We only ask that other participants in the electronic marketplace, who share with us its rewards, also share with us the obligation of making it a safe and secure environment.

RESPONSES OF FRITZ E. ATTAWAY TO QUESTIONS FROM SENATOR FEINSTEIN

Question 1. The libraries and educational institutions ask that they be immunized from criminal liability and liability for damages. I would be interested in your views on both of these suggestions.

Answer 1. I have seen no evidence that criminal copyright liability and liability for damages has placed a hardship on libraries and educational institutions. I see no justification for giving these institutions immunity under the copyright law, or any other law that applies to the public at large, without at least a strong showing that such immunity is required by the public interest.

Question 2. Mr. Vradenburg argues that service providers who act simply as conduits should have legislatively-granted immunity for third party infringement, because it is impossible for them to detect or do anything about infringing material in transmissions.

(a) Do you agree that this is impossible, as he contends?

(b) Do you think they should be given immunity by Congress?

Answer 2. Service providers who act simply as conduits have not been found liable for copyright infringement under existing law. The problem with immunity for such "mere conduits" is that any new law would have to address existing technology and existing marketing practices which may be—in fact, most certainly will be—totally different in a year, or 6 months, or 2 months. What is possible using the technology in place today, may be quite possible with the technology put in place tomorrow. The present law should be kept in place because it is flexible and can adapt in a rapidly changing environment.

Question 3. Mr. Vradenburg argues that "where an infringer is using the machines and software engines of an Internet service provider to place or transmit infringing materials, fairness dictates that a service provider's duty to act, and to be liable, should be triggered only when it has actual knowledge of the infringement, and where it is technically and legally feasible and economically reasonable, to remove or stop it." Other than the potential for disagreement between service providers and copyright owners over what is "economically reasonable," this statement seems fair to me. Do you disagree with this?

Answer 3. I agree, in part, and disagree in part. I agree that actual knowledge should be an important factor in determining liability. However, if it becomes the only factor, there will be an incentive "not to know," and the unscrupulous minority of service providers will have a huge legal loophole in which to hide from responsibility.

Thank you for this opportunity to respond to the Committee's questions. If you have further questions or require additional information, please let me know.

Responses of Cary H. Sherman to Questions From Senator Hatch

Question 1. You made the point in your testimony that bookstores, record retailers, magazine publishers, TV broadcasters, and scores of others are all technically at risk of committing or contributing to copyright infringement by virtue of their day-to-day business operations, yet they continue to do business. Yet some would argue that service providers are unlike these other commercial entities in that they have little say in choosing their suppliers and must deal with a higher volume of content that remains in flux from day to day. In your view, are service providers analogous to these traditional retailers and distributors of copyrighted materials and should they operate under the same liability regimes?

Answer 1. Online and Internet service providers (or collectively, Internet Access Providers or "IAPs") should be subject to the same standard of liability for copyright infringement that applies to bookstores, record retailers and magazine publishers—all of whom may be liable for infringing material contained in any book, album or photograph in their stores or publications. A primary purpose of the copyright law is to provide incentives to avoid copyright infringement at each point along the chain of distribution. This liability regime encourages everyone who has the power to prevent infringement to do so. Thus, a bookstore—which cannot know the content of every book it sells—is motivated to take steps necessary to ensure that infringing material does not fill its shelves. Applying current law to IAPs will further an important public policy objective by encouraging them to work with content providers in developing the technological capability to prevent copyright infringement.

It is rarely the case that IAPs have no control over the content they make available to their subscribers. For example, many IAPs *do* choose the suppliers of content by hosting web sites on their servers. These IAPs make choices about with whom they will do business. Indeed, many such IAPs routinely take contractual steps to relieve themselves of liability for copyright infringement. It is true that some IAPs are mere conduits for the information that flows across their networks. But as the Netcom case (*Religious Technology Center* v. *Netcom online Communication Services Inc.*, 907 F. Supp. 1361 (N.D. Calif. 1995), illustrates, mere conduits are the least likely to be found liable for infringement.

Question 2. You also mentioned in your testimony that there are any number of popular search engines to identify sites that contain sound recordings. Doesn't this suggest that record companies and other content providers could use such engines to police the Internet themselves and go after pirate sites? In other words, why isn't technology the solution as well as the problem?

Answer 2. We believe that technology is the solution to the problem, but not merely search engines are available to help police the Internet. While search engines are valuable tools to help stop infringement once it occurs, the best way to combat copyright infringement is to prevent it *before* it occurs. The Internet is simply too vast and our efforts alone will net only a fraction of the infringers wrongfully exploiting sound recordings. We are working today to develop technology that will stop infringement before it takes place. But any such technological solution is almost certain to be bilateral—requiring not just encoded software but decoders in the network to interpret and respond to the encoded signals. We need the cooperation of the IAPs to help us develop and employ technology. Surely, if it is commercially and technologically feasible for an IAP to use a technology that will prevent infringements from occurring on their networks, there is no reason for them to resist. But if IAPs are exempt from liability for copyright infringement, they will have no incentive to help us protect our works.

Question 3. Utah has upwards of 60 small Internet service providers. These are mostly "mom and pop" operations, very different from telephone companies and America Online. They tell me that if they were sued for copyright infringement, they would be forced out of business. Even if they wanted to police their systems, they claim they would not know how to recognize a pirated work. For this reason they favor "notice and take-down." Why can't we give them a safe harbor?

Answer 3. We are not asking that IAPs serve as the Internet police by obligating them to examine each of the billions of bits of data passing through their networks. However, IAPs should do something when they become aware of an infringement on their own, and they should be responsible for notifying us about things that are obvious to a reasonable person. Even "mom and pop" IAPs should be able to recognize the telltale signs of piracy. For example, a web site unaffiliated with the music industry that is taking up a tremendous amount of server space or a site that has numerous files known to be sound files (e.g., .WAV, .AU or .MP3) is a red flag for piracy. Or, a site such as the one titled "Jon's Take But Don't Tell Page" that has music files on it certainly is a signal for piracy. In these situations, the IAP should have an obligation to notify us of the site. Once they do so, we will undertake to investigate whether infringement is occurring Accordingly, we are in favor of "notice and take-down" provisions, but as an *additional* remedy—not as an exclusive remedy. The law should incentivize IAPs to help us combat infringement.

RESPONSES OF CARY H. SHERMAN TO QUESTIONS FROM SENATOR LEAHY

Question 1. What would be the impact internationally of the United States adopting legislation limiting the liability or exempting online service providers of copyright infringement?

Answer 1. The impact would be great. The most desirable works on the Internet are produced by United States copyright owners. Thus, we have the most to lose from copyright infringement on the Internet. Exempting IAPs will severely hamper our efforts in combatting copyright infringement, and it will send the wrong message to other countries about how we value copyrighted works. It may well spur similar laws in other countries limiting liability of IAPs, thus making the Internet a haven for pirates worldwide instead of a medium for legitimate electronic commerce.

Question 2. Technology and market practices are evolving rapidly. Does legislation limiting the liability of online service providers or Internet access providers pose the risk of becoming obsolete in a short time, or freezing industry practices and preventing them from evolving as efficiently as possible?

Answer 2. We are present for the birth of a new medium of expression and commerce, the Internet. The Internet provides a wealth of opportunity for bringing music to the public. Today, record companies are working together with IAPs to determine what are sensible, efficient and practical means from rooting out infringement. IAPs cooperate with record companies and other content providers because they may be liable if they simply ignore piracy on their systems. For these reasons, existing law provides a good balance for industry practices to evolve in the marketplace. Legislating prematurely will harm industry efforts to develop effective policies to fight copyright infringement.

Question 3. Have any technical means been developed to protect copyright on the Internet by flagging either copyrighted material or infringing material?

(a) If so, are any of these systems capable of being implemented without the cooperation of the OSP/ISP's?

(b) If the liability of OSPs and ISPs is limited for copyright infringement, what effect if any do you anticipate this could have on their willingness and/or incentive to cooperate in developing and implementing technical means to protect copyright online?

Answer 3. Currently, technological means to combat copyright infringement are in development. One thing is clear: We will not be able to protect our music entirely on our own; encryption and other unilaterally-applied technology measures will not prevent any user from taking any of the 4.7 billion compact discs already in the marketplace and uploading the music on them to the Internet. Virtually any technology used to protect music will be bilateral, requiring hardware or software on the Internet or in computers to look for and act upon the technological protection measures encoded in our recordings. Thus, we need the cooperation of the IAPs to help us protect our works, and exempting them from liability will remove their incentive to help us achieve our goal.

Question 4. What are copyright owners doing today to prevent infringement of their creative works on the Internet?

Answer 4. We are taking a number of steps to prevent copyright infringement. First, we are educating the online community about how to detect copyright infringement on the Internet. There are a number of indicia, such as the size and type of files, that should give rise to suspicion of piracy. We are also implementing programs aimed at the university community to distinguish legitimate uses of sound recordings from infringing uses.

We are also constantly surfing the Internet for pirates. When we do locate infringers, we often alert the ISP via cease-and-desist letter that infringing works are available on their system. In some instances, we are enforcing our rights by bringing lawsuits targeted specifically at the infringing site. For example, we recently won restraining orders from Federal courts in New York, Texas and California against three music archive sites. It is important to note that the defendants in these cases were not IAPs, but the individuals who operated the infringing sites. In fact, the IAPs were generally helpful and cooperative in providing us relevant information.

In addition, we are working to develop technology to help us protect our works. But, as stated above, any technological solution will require the cooperation of the IAPs to help develop and employ it.

Finally, in the case of legitimate businesses, we are attempting to develop systems to facilitate the licensing of our works.

Question 5. What technological means, if any, are available today for service providers to identify infringing copies, without having to monitor the content of transmissions?

Answer 5. Today, no technological means exist to identify infringing copies. However, we believe that such technology is not far off in the future. But we need the IAPs to have the incentive to help us develop and implement that technology—an incentive that will disappear if IAPs are exempt from liability for copyright infringement.

Question 6. Have the courts applied the concept of fair use and other exemptions from liability in the copyright law in essentially the same manner in the online environment as they have in the print environment? If not, please cite the case or cases in which these concepts and exemptions have not been applied consistently in the online environment.

Answer 6. We know of no case that has unfairly held an IAP liable, or applied the doctrine of fair use in a manner inconsistent with traditional rulings. This fact further demonstrates that preferential treatment for IAPs is unnecessary. There simply is no legal crisis for the online community and no evidence to believe one is looming.

Question 7. Current copyright laws exempt parties from liability in certain circumstances. For example, section 111 of Title 17, exempts "passive carriers" who retransmit broadcast signals containing copyrighted programming when the carrier "has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission" and whose relevant activities "consist solely of providing wires, cables or other communications channels for the use of others."

(a) Are OSPs and ISPs in a similar position as the "passive carriers" already granted an exemption under our copyright laws?

(b) What is your view of crafting a similar exemption specifically for OSPs or ISPs? Would that be enough, and if not, could you explain why?

Answer 7. Section 111 does not apply as a technical matter to IAPs. Moreover, IAPs in a similar position to "passive carriers" only in certain circumstances, namely where they are "mere conduits" and do not host web sites or sponsor content. Creating a similar exemption for such "mere conduits" is a possible solution and would certainly suffice to protect such providers. We note, however, that it is unlikely a court would impose liability on a passive carrier; thus, a change in existing law is not necessary.

Question 8. Part of the negotiations on this issue that occurred in the House last year revolved around a code of conduct requiring that a service provider adhere to certain operating procedures before it could avail itself of any limitations on copyright liability. This code of conduct would have required, among other things, the OSPs inform users of their obligations to respect copyright rights and terminate the access of known and repeat copyright infringers.

(a) Is this code of conduct being followed by online service providers?

(b) If so, what parts or all of it?

Answer 8. We do not know whether such a code of conduct is being followed. The OSPs are in the best position to answer this question.

Question 9. What are your views of the "notice" and "take down" procedures discussed in the negotiations lead by Congressman Goodlatte last year?

Answer 9. Notice and take down procedures are helpful as an additional remedy, but they are an inadequate solution in and of themselves. They do too little, too late because they occur only after the infringement has taken place. The damage may already be overwhelming once notice and take down procedures are triggered. If an IAP has reason to know of infringing activity, it should not be entitled to sit idly by waiting for the copyright owner to detect it. Copyright protection will be effective only if it prevents infringement, and we need the cooperation of the IAPs to make deterrence a reality.

Question 10. Would a mandatory notice and take-down procedure violate the "no formality" requirement of the TRIPS agreement? Please explain why.

Answer 10. The answer to this question depends on what is meant by "a mandatory notice and take-down procedure." If a notice and take-down procedure was "mandatory" because an OSP was obligated to follow that procedure to avoid infringement liability, it would not violate the United States' treaty obligations because it would not subject the enjoyment and exercise of copyright rights to any formality.

On the other hand, if a notice and take-down procedure was "mandatory" because a copyright owner had to follow that procedure before initiating an infringement action, it probably would violate the Unite States' treaty obligations. Interestingly, the treaty violation would be caused by the application of such a requirement to works by authors from foreign Berne Convention member countries. That is, it would not be a treaty violation to apply such a requirement to works by U.S. nationals only. We would oppose any such procedure that was a precondition to enforcement. Moreover, because the U.S. leads the world in the creation of copyrighted works, we believe it would be especially unfair to impose such a procedure as a precondition to enforcement of U.S.-origin works but not foreign works.

Question 11. The recent court cases of *Microsoft* v. *Ticketmaster* and *TotalNews* have raised the issue of whether contributory copyright infringement liability applies to hyperlinking. In your view, does hyperlinking pose any risk of contributory copyright infringement liability if the site which is linked contains infringing material? If so, what effect, if any, do you think this will have on the freedom of users to hyperlink?

Answer 11. Hyperlinking is a great attribute of the Internet. But it would be wishful thinking to regard all hyperlinking as merely a helpful tool to navigate the Internet. Some web sites consist entirely of links to pirated sound recording files. One such site that we are aware of was comprised of an alphabetical list of pirated sound recordings that provided a link to each one. By so doing, the site avoids reproducing copyrighted works, but the operator is nevertheless willfully and knowingly facilitating the piracy of the sound recordings by creating a "pirate directory." Such a site suggests to us that hyperlinking is not a black and white issue, and that some forms of hyperlinking do raise an issue of copyright infringement. Fortunately, existing law can handle such situations well.

Question 12. In the physical world, if someone publishes a directory that references or cites to a work that infringes a copyright, my understanding is that the directory itself is not an infringing work nor is the author of the directory subject to liability for copyright infringement.

(a) Is my understanding correct?

(b) Should hyperlinking be treated any differently?

Answer 12. Again, there is no clear answer to the issue of hyperlinking. Of course, one who merely references a copyrighted work in the course of an otherwise legitimate directory is not a copyright infringer. However, one who creates a directory for the purpose of facilitating infringement may well be liable. This law applies equally well to hyperlinking, and there is no reason that hyperlinking should be treated any differently.

Question 13. Please describe generally what happens now when your company or member companies discover an electronic bulletin board service on the Internet Web site with pirated works.

Answer 13. First, we confirm whether the sound recordings are indeed unlicensed. Once we obtain such confirmation, we send a cease and desist letter to the web site care of the IAP. In virtually all cases, the IAP removes the infringing site.

Question 14. What is the evidence showing that our current copyright laws are making the growth of the Internet suffer?

Answer 14. There is no evidence that the growth of the Internet is being stunted by our current copyright laws. To the contrary, the Internet continues to grow at a phenomenal rate. For example, the number of Internet servers has increased from 213 in 1981 to more than 16 million today. That number is expected to climb to 110 million in the year 2001. Obviously, current copyright regime has fostered this growth by providing the requisite balance between protection and access.

Question 15. Under what circumstances, if any, would an individual "browsing" the Web be subject to liability for copyright infringement.

Answer 15. Browsing is not easily defined. When a user is merely viewing a web site he or she would not be subject to liability. However, if a user downloads unauthorized content, he or she may be liable for copyright infringement in certain circumstances.

Question 16. Several witnesses suggest that "innocent transmitters", or those who unwittingly distribute infringing material, should not be held liable for the copyright infringement initiated by others. Would this represent a significant change to the Copyright Act, which does not require culpable knowledge for imposition of liability, but instead provides for limited statutory damages or mitigation of damages?

Answer 16. Yes, such an exemption would represent a significant change to the copyright law. Copyright law is intended to protect an owner regardless of whether it is in privity with a user. This tenet is of fundamental importance for copyright protection and should not be disturbed absent a compelling need to do so. But such a change is unnecessary because there is no case that has imposed liability for infringement unfairly in circumstances where someone is an "innocent transmitter".

Question 17. Are the online service providers and Internet access providers seeking an exemption from direct liability for copyright infringement or just from contributory or vicarious liability?

Answer 17. The OSPs and IAPs are in the best position to clarify their arguments.

Question 18. If OSP's are exempt from the universal service surcharge levied against telecommunications services because they do more than common carriers, should they at the same time be granted a special exemption from copyright liability on the grounds that they act just like common carrier?

Answer 18. No, OSPs should not be granted an exemption on the grounds that they are similar to common carriers. This question illustrates how OSPs modify the characterization of their activities depending upon the legislative issue pending at the time.

Question 19. Should there be any difference in copyright infringement liability for online services provided by commercial providers and universities and libraries?

Answer 19. We are willing to explore whether the law should treat universities and libraries differently than commercial providers of online services. We note that the copyright law has in other contexts provided different treatment to libraries and educators, such as exempting the public performance of a work in the course of teaching activities. See 17 U.S.C. § 110(1). We are prepared to discuss whether such an exemption should apply here as well. However, any such exemption should be narrow and carefully crafted, as are provisions such as section 110(1), to respond to the legitimate needs of non-profit educators without unnecessarily interfering with the rights and expectations of copyright owners. The incentives that currently exist for universities and libraries to honor the copyright law should remain in place.

Question 20. In the debate over whether Congress should create a new type of property protection for data bases, opponents argue that those who seek legislation bear a heavy burden of proving why legislation is necessary. Do you think that those who seek legislation limiting OSP/IAP liability have met their burden of proof?

Answer 20. Clearly not. The recent hearings before both the Senate Judiciary Committee and the House Judiciary Subcommittee on Courts and Intellectual Property demonstrated the paucity of the IAPs' case for legislation. They could point to no court ruling, no existing or pending legal crisis, and no threat to their businesses that justified the preferential treatment that they seek under the copyright law. Nor could they. There have been but a few cases involving IAPs, and none has unfairly held an IAP liable. Likewise, IAPs continue to grow along with the Internet generally, and have not been forced to halt this growth due to the fear of copyright infringement liability. Accordingly, the IAPs have not met their burden.

Question 20a. How has that burden been met any differently in this case than with those who seek data base protection?

Answer 20a. As to a comparison with those who seek data base protection, we have no view on that issue.

Question 21. In 1993, the Ninth Circuit in *MAI* v. *Peak* decided that when a computer repair company turned on a computer to perform maintenance work, a copyright infringement occurred because the repair worker was not a licensed user of the software and caused a RAM copy of the software to be made. In the 104th Congress, the House—but not the Senate passed a bill to respond to *MAI* v. *Peak* and provide a limited exemption from copyright liability for copying a computer program "solely by virtue of the activation of a machine" in order to repair and maintain a computer. What is your view of such a limited exemption from copyright liability?

Answer 21. We have no view on the limited exemption from copyright liability in the House bill responding to *MAI* v. *Peak*.

Question 22. Nonprofit libraries are permitted under the copyright laws to lend computer software. Borrowers are unable to use the borrowed program without downloading it into the random access memory (RAM) of their computers so they are able to use or read it on their computer.

(a) Does the making of a temporary copy in RAM implicate any rights of the copyright holder and, if so, what are the risks of copyright infringement liability on the part of the borrower?

(b) Should the liability for copyright infringement for borrowers of computer software be clarified and, if so, what would you recommend?

Answer 22. This is an issue more appropriately addressed by the software industry.

Question 23. Many Internet browsers cache "locally" by storing recently visited Web pages in the user computer's RAM to save time and burden on the Internet infrastructure from having to access the actual site. Caching also occurs on the sever level, called "proxy" caching, so that OSPs, may store the most frequently requested sites on their own computer. When a user seeks a particular site, the online provider delivers a copy from its own computers' memory rather than from the Web site in question. Caching is considered essential to the successful functioning of the Internet.

(a) Does "caching" implicate any rights of the copyright holder and, if so, what are the risks of copyright infringement liability on the part of the computer user or online service provider?

(b) Should the liability for copyright infringement for the automatic "caching" engaged in by computers be clarified and, if so, what would you recommend?

Answer 23. Yes, "caching" does implicate the rights of the copyright owner, but this question provides an instructive example of how the marketplace—rather than an amendment to the law—is better suited to resolve these issues. Complaints about caching have come less from copyright owners than from web site operators who (1) are unable to determine the number of "hits" recorded on their site, and (2) are unable to ensure that the regular updates of content on the site are being conveyed to the user. Technological and contractual mechanisms are solving these problems, some of which prevent and some of which control caching.

It is important to note that caching comes in a variety of shapes and sizes, and there is no clear answer as to how copyright law should address it. That is why we do not believe this issue is ripe for legislative consideration. There are no cases addressing caching and we do not foresee any impact on the practice of caching or the growth of the Internet. There is no question that the Internet poses interesting and challenging academic questions, but that does not lead to the conclusion that we need legislation to answer those questions today.

Question 24. Your testimony refers to a recent case that the Recording Industry Association of America (RIAA) brought against music archive sites for copyright infringement. Has the RIAA or its member companies filed many cases of copyright infringement against OSP/IAPs or telephone companies?

Answer 24. The RIAA has filed no cases of copyright infringement against OSPs/ ISPs or telephone companies. Defendants in the music archive site legislation were the operators of the sites where the infringing material was located.

RESPONSES OF CARY H. SHERMAN TO QUESTIONS FROM SENATOR GRASSLEY

Question 1a. You represent a large, well known association with many members and resources.

What can the Recording Industry Association of America do to help its members fight copyright piracy, apart from working for legislation?

Answer 1a. RIAA and its members are working hard to educate the online community about the piracy of sound recordings on the Internet. We are also doing our best to enforce our rights by surfing the web, investigating potentially infringing sites, and bringing targeted lawsuits against those web site operators that are wrongfully exploiting our works. Finally, in some instances, we are developing systems to facilitate the licensing of legitimate businesses to use our works.

Despite these efforts, however, copyright infringement of sound recordings continues to flourish on the Internet. We are simply unable to deter and remedy all of that infringement ourselves. That is why we need the cooperation and help of IAPs; under current law the IAPs have an incentive to work with us. An exemption from liability for infringement for IAPs will destroy those incentives and ultimately threaten the legitimate availability of sound recordings in the future.

Question 1b. Has there been any discussions about hands-on assistance from your organization?

Answer 1b. We are willing and able to work with IAPs. We have had direct discussions with some IAPs, and we are currently developing a set of guidelines to help IAPs identify infringing sites.

Question 1c. Do you find or remove illegal information on the Internet?

Answer 1c. We do endeavor to ferret out pirated material on the Internet by surfing the web. Once we identify an infringing site, we send a cease and desist letter to the web site operator care of the IAP. In most every situation, the IAP has cooperated with us and removed the infringing site.

Question 1d. Is there any reason you could not help solve this problem?

Answer 1d. As detailed above, we do our best to help solve the problem of copyright infringement. However, we are limited by the extraordinary size of the Internet. Our efforts can only reach a fraction of the infringing sites that exist. We need the help of the IAPs to deter copyright infringement. Under existing law, we are receiving that help from the IAPs and are confident that we will work together to find technological solutions to piracy on the Internet. However, if the law is changed, we fear that the IAPs will have no incentive to help us solve the problem.

Question 1e. What, specifically, has your organization done to help solve the problem of Internet piracy?

Answer 1e. As discussed above, we are working to educate the online community, investigate potentially infringing sites, and enforce our rights as necessary. We are also working toward a technological solution that will make it easier to identify copyright infringement before the damage is done. Again, we cannot do the job alone. We need the help of IAPs to develop and implement technology that will work, and to help us get rid of existing infringing sites.

Response of Cary H. Sherman to a Question From Senator Feinstein

Question 1. The libraries and educational institutions ask that they be immunized from criminal liability and liability from damages. I would be interested in your views on both of these suggestions.

Answer 1. We are willing to explore the possibility of a narrowly crafted liability exemption for libraries and educational institutions that responds to the legitimate needs of non-profit educators without unnecessarily interfering with the rights and expectations of copyright owners. The incentives that currently exist for universities and libraries to honor the copyright law should remain in place.

Responses of Daniel Burton to Questions From Senator Hatch

Question 1. Mr. Sherman made the point in his testimony that bookstores, record retailers, magazine publishers, TV broadcasters, and scores of others are all technically at risk of committing or contributing to copyright infringement by virtue of their day-to-day business operations, yet they continue to do business. Yet some would argue that service providers are unlike these other commercial entities in that they have little say in choosing their suppliers and must deal with a higher volume of content that remains in flux from day to day. In your view, are service providers analogous to these traditional retailers and distributors of copyrighted materials and should they operate under the same liability regimes?

Answer 1. online service providers as a business are indeed analogous to other business selling copyrighted works. The means by which they make the works available should not determine how the copyright law is applied to their activities. In both instances, the issue of their liability turns on the degree of control they can exercise and their knowledge of the infringement.

Question 2. Mr. Sherman also mentioned in his testimony that there are any number of popular search engines to identify sites that contain sound recordings. Doesn't this suggest that record companies and other content providers could use engines to police the Internet themselves and go after pirate sites? In other words, why isn't technology the solution as well as the problem?

Answer 2. Technology is certainly part of the solution. Software companies do use a number of tools, including using search engines to look for cites containing certain types of terms which are often used by pirates. But finding the site, and actually removing it from the systems are two different things. Thus, we need the cooperation of system operators to actually remove the infringing material, as well as providing information about the person posting the material, so we can initiate suits.

Question 3. Novell is an important Utah business, but Utah also has upwards of 60 small Internet service providers. These are mostly "mom and pop" operations, very different from the telephone companies and America Online. They tell me that if they were sued for copyright infringement, they would be forced out of business. Even if they wanted to police their systems, they claim they would not know how to recognize a pirated work. For this reason they favor "notice and take-down." Why can't we give them a safe-harbor?

Answer 3. The key factor is not the size of the entity—whether it is a small family run business or a large corporation. The key factor is whether the system operator is acting responsibly and legally. For these reasons we do not think that the scope of copyright liability should be based on the size of the infringer.

Question 4. What are the minor changes to S. 1121, the "WIPO Copyright Treaties Implementation Act," that you mentioned in your testimony?

Answer 4. Implementing legislation should not enlarge or diminish the scope of fairs use, and it should provide that only "effective" technological measures to protect copyrighted works are subject to protection from unauthorized circumvention.

Responses of Daniel Burton to Questions From Senator Leahy

Question 1. What would be the impact internationally of the United States adopting legislation limiting the liability of online service providers of copyright infringement?

Answer 1. Some of our most serious piracy problems are outside the United States. We already had a very hard time getting effective enforcement in many countries. Since these countries watch closely developments in the United States, any limitations on liability we enact, are certain to be adopted abroad. Given the piracy situation in many of these countries, limitations on liability will only make matters worse.

Question 2. Technology and market practices are evolving rapidly. Does legislation limiting the liability of online service providers or Internet access providers pose the risk of becoming obsolete in a short time, or freezing industry practices and preventing them from evolving as efficiently as possible?

Answer 2. The Internet and Internet-based businesses are still in their early stages of development. While we can identify a number of situations in which liability should attach, it is unclear whether they constitute the full panoply of issues that will emerge as network based distribution of works evolves as a business. For that reason, we encourage the Committee to make the least changes to the law possible, consistent with the goal of proceeding with legislation on the full range of copyright issues.

Question 3. Have any technical means been developed to protect copyright on the Internet by flagging either copyrighted materials or infringing materials?

- If so, are any of these systems capable of being implemented without cooperation of the OSP/ISPs?
- If the liability of OSP and ISPs is limited for copyright infringement, what effect if any do you anticipate this would have on their willingness and/or incentive to cooperate in developing and implementing technical means to protect copyright online?

Answer 3. We believe that if operators of networking services were relieved of liability, they would cease to cooperate with us in fighting piracy. The copyright law is the incentive for cooperation.

Question 4. What are copyright owners doing today to prevent infringement of their creative works on the Internet?

Answer 4. Every major software company is working both on its own and through associations such as the BSA and the SPA, as well as law enforcement officials to fight piracy. We are devoting substantial and increasing resources to these efforts.

Question 5. What technological means, if any, are available today for service providers to identify infringing copies, without having to monitor the content of transmissions?

Answer 5. I do not have any information on this question, Novell is not in the business of providing online access services.

Question 6. Have the courts applied the concept of fair use and other exemptions from liability in the copyright law in essentially the same manner in the online environment? If not, please cite the case or cases in which these concepts and exemptions have not been applied consistently in the online environment.

Answer 6. We are not aware of any cases in which the courts have made the distinction in applying the copyright law based on the online environment.

Question 7. Current copyright laws exempts parties from liability in certain circumstances. For example, section 111 of Title 17, exempts "passive carriers" who transmit broadcast signals containing copyrighted programming when the carrier "has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission" and whose relevant activities "consist solely of providing wires, cables or other communications channels for the use of others."

(a) Are OSPs and ISPs in a similar position as the "passive carriers" already granted an exemption under our copyright laws?

(b) What is your view of crafting a similarly limited exemption specifically for OSPs and ISPs? Would that be enough and, if not, could you explain why?

Answer 7. We believe that if the Senate finds that it is necessary to legislate in this area, provisions similar to the passive carriage rules would be a good model to use.

Question 8. Part of the negotiations on this issue that occurred in the House last year revolved around a code of conduct requiring that a service provider adhere to certain operating practices before it would avail itself of any limitations on copyright liability. This code of conduct would have required, among other things, that OSPs inform users of their obligations to respect copyrights and terminate the access of know and repeat copyright infringers.

(a) Is this code of conduct being followed by online service providers?

(b) If so, what part or all of it?

Answer 8. We do not have information on the practices of ISP's and OSP's generally. We are aware that some of the larger OSP's do provide copyright notices, while a great many of the ISP's do not.

Question 9. What are your views of the "notice" and "take down" procedures discussed in the negotiations lead by Congressman Goodlatte?
Answer 9. Notice and takedown is in fact today's system. Software industry practice is to notify operators of systems of infringing activity, and in most instances they take down the material. In large measure, this systems works because of the incentives provided by the current copyright law for cooperation. Any resolution which would limit the service providers sense of responsibility to cooperate would harm our piracy efforts. Moreover, take down can entail activities which would require developing additional technological capabilities. With these considerations in mind, we remain prepared to discuss clarifications of the law in respect of the balance of responsibilities with respect to notice and take-down.

Question 10. Would a mandatory notice and take-down procedure violate the "no formality" requirement of the TRIPS agreement? Please explain why.
Answer 10. Such a provision could constitute a precondition for enforcement of rights, and as such a "formality" on enjoyment of copyright. Whether it would violate our international obligations would depend on how it is drafted.

Question 11. The recent court cases of *Microsoft* v. *Ticketmaster* and *Total News* have raised the issue of whether contributory copyright infringement liability applies to hyperlinking. In your view, does hyperlinking pose any risk of contributory copyright infringement liability if the site which is linked contains infringing material? If so, what effect, if any, do you think this will have on the freedom of users to hyperlink?
Answer 11. Whether hyperlinking constitutes infringement would depend on the facts of the specific case. That is, the degree of involvement and control in the person proving the hyperlink to the infringing site. We do not have enough information about these pending cases to provide an opinion.

Question 12. In the physical world, if someone publishes a directory that references or cites to a work that infringes a copyright, my understanding is that the directory itself is not an infringing work nor is the author of the directory subject to any liability for copyright infringement.
(a) Is my understanding correct?
(b) Should hyperlinking be treated any differently?
Answer 12. Your understanding is right, unless the directory is a specific manual of where to find infringing sites, and how to down-load materials. Directories per se, should not create liability.

Question 13. Please describe generally what happens now when your company, or member companies discover an electronic bulletin board service or an Internet Web site with pirated works?
Answer 13. We seek the cooperation of the operator in removing the infringing material, and we generally receive good cooperation.

Question 14. What is the evidence showing that our current copyright laws are making the growth of the Internet suffer?
Answer 14. We have seen no such evidence. The Internet is growing rapidly. Investment continues to flow into these business. And the price of Internet service to consumers continues to drop.

Question 15. Under what circumstances, if any, would any individual "browsing" the Web be subject to liability for copyright infringement?
Answer 15. Browsing as such, does not create liability, unless the material examined is protected against browsing, in which case the act of unauthorized access to the work should create liability. Associated downloading of infringing material would violate the copyright law.

Question 16. Several witnesses suggest that "innocent transmitters", or those who unwittingly distribute infringing material, should not be held liable for the copyright infringement initiated by others. Would this represent a significant change to the Copyright Act, which does not require culpable knowledge for imposition of liability, but instead provides for limited statutory damages or mitigation of damages?
Answer 16. No, such a change would be consistent with results under current law. It should be noted, however, that while current law provides for limits on statutory damages, it does not provide for total immunity from liability.

Question 17. Are the online service providers and Internet access providers seeking an exemption from direct liability for copyright infringement or just from contributory or vicarious liability?

Answer 17. Not applicable.

Question 18. If OSPs are exempt from the universal service surcharge levied against telecommunications services because they do more than common carriers, should they at the same time be granted a special exemption from copyright liability on the grounds that they act just like a common carrier?

Answer 18. While this is a question directed at operators of communications systems, we do note that we agree that one "should not be able to have it both ways."

Question 19. Should there by any difference in copyright infringement liability for online services provided by commercial providers and by universities or libraries?

Answer 19. As a general matter, the law makes no distinction. The Copyright Act already limits remedies against non-profit educational institutions and libraries that have reasonable grounds for believing that the use of the work is a fair use.

Question 20. In the debate over whether Congress should create a new type of property protection for databases, opponents argue that those who seek legislation bear a heavy burden of proving why legislation is necessary. Do you think that those who seek legislation limiting OSP/ISP liability have met their burden of proof?

Answer 20. No. While we recognize that certain circumstances may attain in which liability could attach in ways that have a chilling effect on the Internet, the evidence thus far does not suggest that such a point has been reached.

Question 21. In 1993, the Ninth Circuit in *MAI* v. *Peak* decided that when a computer repair company turned on a computer to perform maintenance work, a copyright infringement occurred because the repair worker was not a licensed user of the software and caused a RAM copy of the software to be made. In the 104th Congress, the House—but not the Senate—passed a bill to respond to *Mai* v. *Peak*, and provide a limited exemption from copyright liability for copying a computer program "solely by virtue of the activation of a machine" in order to repair and maintain a computer. What is your view of such a limited exemption from copyright liability?

Answer 21. We support the House enacted legislation in the last Congress. Its aim was to address a specific issue: promoting competition in third party servicing of computers. Moreover, the bill was narrowly aimed at that issue.

Question 22. Nonprofit libraries are permitted under the copyright laws to lend computer software. Borrowers are unable to use the borrowed program without downloading it into the random access memory (RAM) of their computers so that they are able to read or use it on their computer.

(a) Does the making of a temporary copy in RAM implicate any right of the copyright holder and, if so, what are the risks of copyright infringement liability on the part of the borrower?

(b) Should the liability for copyright infringement for borrowers of computer software be clarified and, if so, what would you recommend?

Answer 22. Section 117 of the Copyright Act addresses this issue and resolves it. A copy is made because it is dictated by the way the machine is designed. Under section 117, if the person is the owner of the software, or the owner has granted permission for this act of RAM copying, the law does not create liability. Thus, with respect to the library, the issue is whether the terms under which they acquired the program permit the acts in question.

Question 23. Many Internet browsers cache "locally" by storing recently visited Web pages in the user computer's RAM to save time and burden on the Internet infrastructure from having to access the actual site. Caching also occurs on the server level, called "proxy" caching, so that OSPs, may store the most frequently requested sites on their own computer. When a user seeks a particular site, the online provider delivers a copy from its own computers' memory rather than from the Web site in question, Caching is considered essential to the successful functioning of the Internet.

(a) Does "caching" implicate any rights of the copyright holder and, if so, what are the risks of copyright infringement liability on the part of the computer user or online service provider?

(b) Should the liability for copyright infringement for automatic "caching" engaged in by computers be clarified and, if so, what would you recommend?

Answer 23. As your question implies, caching at the users computer is a necessary step in accessing a WEB site. As such, the person creating the web site is fully aware of this, thus the caching by the user is implicitly licensed. Whether caching by the service provider for purposes of speeding-up their system is permitted, depends on whether they have obtained permission.

Response of Daniel Burton to a Question From Senator Grassley

Question 1. In your testimony, you state that you have had good experiences obtaining the help of network providers in removing and blocking access to infringing material. How have they been helpful and do you think they would be less helpful if the law clearly exempted them from liability?

Answer 1. They are motivated to help by the copyright act. Thus, generally, service providers, have taken down material upon notice from us. If they were relieved of copyright liability, we feel they would loose their sense of responsibility to cooperate.

Responses of Daniel Burton to Questions From Senator Feinstein

Question 1. The libraries and educational institutions ask that they be immunized from criminal liability and liability for damages. I would be interested in your views on both of these suggestions.

Answer 1. The Copyright Act already limits remedies against non-profit educational institutions and libraries that have reasonable grounds for believing that the use of the work is a fair use. Care must be taken not to create a situation where libraries and educators can cast a blind eye on infringement, knowing full well that they are immune from liability for damages or criminal prosecution. Thus, a balance must be maintained which would motivate them to continue acting responsibly in fighting piracy.

Question 2. Mr. Vradenburg argues that service providers who act simply as conduits should have legislatively-granted immunity for third party infringement, because it is impossible for them to detect or do anything about infringing material in transmissions.

(a) Do you agree that this is impossible, as he contends?

(b) Do you think they should be given immunity by Congress?

Answer 2. It is not impossible, just costly in the sense that certain new technologies may have to be developed to fully do the job. On your second question, if they are given immunity, service providers will have no incentive whatsoever to cooperate with authors in fighting piracy on the Internet.

Question 3. Mr. Vradenburg argues that "where an infringer is using the machines and software engines of an a Internet service provider to place or transmit infringing materials, fairness dictates that a service provider's duty to act, and to be liable, should be triggered only when it has actual knowledge of the infringement, and where it is technically and legally feasible and economically reasonable, to remove or stop it." Other than the potential for disagreement between service providers and copyright owners over what is "economically reasonable," this statement seems fair to me. Do you disagree with this?

Answer 3. If service providers are required to act only on "actual knowledge" their motivation to cooperate with authors will dissipate. The reason why courts have developed the doctrines of contributory and vicarious copyright liability is based on this recognition. Actual knowledge, the courts have determined, is an incomplete standard to deter infringement with respect to works distributed through long established channels, and nothing in the current state of the marketplace suggests that the electronic distribution of works is so different as to justify a different assessment of the needs to fight infringement. The key considerations in determining liability, regardless of the means used to distribute the work, should be the same: control, knowledge, financial gain, and responsible activity by all the involved parties.

Question 4. In your testimony, you argue against excluding the making of temporary, transient electronic copies from copyright liability by giving the example of a server in a country without copyright protection who infringes by making extra copies there, arguing the software developer would be left without a remedy for this infringement. But in this example, isn't the developer's real grudge against the operator of the foreign server? What has the telephone company done other than to simply transmit a signal over its lines, the contents of which are unknown to it? Why should the telephone company then be made to pay the software developer for the incidental, transient and temporary copies that are made in this process, which remains in its system for less than a second?

Answer 4. While you are quite right that our "real grudge" is with the foreign operators, the damage to our interests occurs in the United States, where the person downloading the infringing copy resides. To deter this activity, we must have the cooperation of the person making it possible for the infringer to gain access to the work. Thus, our goal is to obtain cooperation from service providers, and the copyright law provides to incentives for such cooperation.

Question 5. You argue against a "notice and take-down" approach, by saying that "making notice a precondition for suit would simply constitute an invitation for the pirate to destroy the evidence of his infringement." How does this undercut the argument for applying notice and take-down to third party service providers? In a direct infringement action against the pirate himself, the pirate could just as easily destroy the evidence of his infringement. It would seem that the evidence of infringement could be gathered before the notice to the service provider is given. Moreover, the pirate destruction of his evidence does not speak to the point of the culpability of the service provider.

Answer 5. In many cases, we don't know who the pirate is or where they are located. It is important that we act quickly because pirates are nomadic and cover their tracks. Even if we have gathered evidence, we many not be able to locate the pirate.

RESPONSES OF GEORGE VRADENBURG, III TO QUESTIONS FROM SENATOR HATCH

Question 1. Mr. Sherman made the point in his testimony that bookstores, record retailers, magazine publishers, TV broadcasters, and scores of others are all technically at risk of committing or contributing to copyright infringement by virtue of their day-to-day business operations, yet they continue to do business. Why can't the service providers do likewise?

Answer 1. Contrary to Mr. Sherman's claim, an online service provider is much more at risk of copyright infringement suit and potential liability under today's law than a bookstore, record retailer, magazine publisher, TV broadcaster or any other example he can identify. This results from a combination of factors, most notably (i) the fact that the Internet, unlike any other medium, makes each and every member of the public a publisher; (ii) the sheer volume of traffic on the Internet, and the physical and legal impossibility of inspecting each transmission and each site, (iii) the ever changing nature of the content, and (iv) the fact that, unlike the online context, in the other industries, the direct infringer typically a responsible business, who, as a practical matter, is the party the copyright owner will look to in the event of infringement.

The bookstore and record retailer examples are wholly inapposite. Bookstores and record retailers deal with a relatively limited number of reliable publishers or labels, wholesalers, and distributors with which they have extensive dealings. The store is able to select the wholesalers and publishers (or labels) with which it deals. Most are reputable businesses that are used to dealing with copyright issues and ensure that copyrights are not infringed by their authors or performing artists. The bookstore and record retailer can decide not to deal with a wholesaler, publisher, or label which does not properly address copyright issues. Further, any indemnification provided by a publisher or label provides real protection because they are substantial businesses. Consequently, any infringed copyright owner will proceed against the publisher or label. As a practical matter, the copyright owner typically does not bring suit or seek to impose liability against bookstores.

Thus, over the last century, there have been almost no copyright infringement cases brought against bookstores, notwithstanding their continuous operation nationwide for many decades. However, over the last several years during which the Internet has struggled to establish itself as a fledgling, we have already witnessed a half dozen copyright infringement suits, resulting in published opinions, targeted against bulletin board (BBS) operators and Internet Service Providers (ISPs).

In contrast to booksellers, the online service provider deals with the public at large. Typically, this means a huge number of individuals. It has no way to protect itself against a member of the public who decides to infringe nor any way to identify or deal only with "reputable" members of the public. Indeed, there are often cases where the online service provider is not even dealing with the primary infringer, such as when the online service provider acts as a conduit for the transmission of material from off of its system. Further, there is no way to obtain meaningful indemnification from an online user. Finally, while the content of a book and record is fixed, the material on the Internet is ever changing.

The TV broadcaster and magazine publisher examples are equally irrelevant. The broadcaster typically has total control over everything that is broadcast, and, to the extent it doesn't, is dealing with a well known and reliable program supplier. The publisher has final editorial control over everything in the magazine and is able to examine everything that goes into the magazine prior to publication. The online service provider simply cannot examine the billions of bits of information that reside on or transit its system. It is worth noting that, to the extent an online service provider acts as a publisher by providing or contracting for specific material as part of its service offering, it should not receive special protection from liability.

Question 2. Would you please comment on the fact that providing Internet services seems to be a robust business, despite the current threat of copyright infringement liability?

Answer 2. The question implies that the vigor of the Internet services market is an indication that the threat of ISP and OSP (online service provider) infringement liability is greatly overstated. The next step in this logic is that even if liability is fixed upon service providers for the acts of their users, the content community is reasonable and will not seek damages from ISPs/OSPs except in egregious cases where fault is clear. Of course, every rights holder's dream is to obtain a broad capacity to enforce a wide range of claims, coupled with the luxury of forbearing in ordinary cases provided its potential targets conduct themselves satisfactorily.

The possibility of such forbearance, however, gives little comfort to ISPs and OSPs who will be compelled to rely for a stable business environment upon the mercies of content owners.

In short, the fact that the Internet thrives and few copyright suits are currently brought weakens not at all the ageless observation that power once granted is invariably used. It is also worth noting that the grant of such discretionary power also gives the grantee great leverage with which to work its will in unrelated business negotiations.

With respect to the actual dynamics of the Internet services business, clearly, different companies and entrepreneurs enter a market for different reasons and on the basis of differing assessments of risk, return, etc. Nevertheless, informed speculation enables us to suggest a few general factors which may be among those behind the continuing strength in this area of the economy:

- Ignorance. Smaller ISPs and entrepreneurs, especially, may simply be unaware of the potential liability they face.
- Vagueness. Even those who are concerned have a hard time quantifying the risk, which makes it easier to forget as time passes.
- Uncertainty. For many, the fact that the law is in a state of flux and the policy is being debated in depth at the federal level lets them rationalize that there really isn't any threat yet.
- Hope. Entrepreneurs seem to be characterized by an unusual capacity for optimism, which allows them to follow their dreams even when skeptics point out the obstacles. Of course, many stumble over those obstacles and never make it, but many of them are willing to forge ahead, nonetheless, with impassioned hope.
- Love. If the truth be told, many of those who have entered the market did so regardless of the risks, simply because they were swept away by the excitement of helping create a revolutionary new medium. They would love to make it big, no doubt, but in their heart they love what they're doing and would do it even if they had to eat hamburgers the rest of their lives.
- Opportunity. Even many long-established companies have plunged into the market, not because they could see clearly where the most reliable revenues would be, nor because they developed a favorable fact-based risk/benefit analysis, since the data and experience are simply not available. Rather, they have joined the fray because the opportunities seem so huge, because whether their entry prospers or falters, they sensed "sitting this one out" would only relegate them to the sidelines in a historic business shift.

In conclusion, whatever the reasons for the strength of activity in this area, they offer no support for the claim that the advent of pervasive copyright liability for third party actions is an innocuous development. Regardless of the situation now, as soon as the rights holders are given what they have persistently asked, and thus no longer have to exercise a diplomatic self-restraint; as soon as the law unequivocally requires service providers to monitor their electronic traffic and hosted web sites or be liable for copyright infringement; then without question the incredible capabilities of the global network will be significantly and artificially limited, many new applications will be aborted, costs to consumers will escalate, and providers will be forced into one-sided liaisons with the most powerful content organizations as a matter of simple self-preservation.

RESPONSES OF GEORGE VRADENBURG III TO QUESTIONS FROM SENATOR LEAHY

Question 1. What would be the impact internationally of the United States adopting legislation limiting the liability or exempting from liability online service providers of copyright infringement?

Answer 1. The impact internationally of the United States adopting national legislation limiting or exempting ISPs and OSPs from liability for certain potential acts of copyright infringement would be that other nations would follow its leadership and seek to implement equivalent legislation with respect to their ratification of the Treaties, thereby largely resolving this issue on a worldwide basis.

The United States has some of the strongest intellectual property laws in the world. The intellectual property that those laws protect has become a significant and growing part of the United States economy. Commissioner Lehman has emphasized at recent Hearings on the "WIPO Copyright Treaties Implementation Act" (H.R. 2281) and the "Online Copyright Liability Limitation Act" (H.R. 2180), before the House Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, that the world is watching how the United States implements the Treaties and protects intellectual property in the digital environment. Jack Valenti, President of the Motion Picture Association of America, recently stated at a press conference sponsored by the Creative Incentive Coalition, that "[t]his treaty is so tilted toward us that no other country is going to ratify it if we don't."

The lead of the United States in crafting worldwide solutions for handling intellectual property, especially involving the information society, is at risk, and will certainly be lost if the United States does not at least address the issue of ISP/OSP liability during the implementation of these Treaties. Martin Bangemann, Member of the European Commission, in his recent call for a comprehensive information society policy stated:

> "We will undoubtedly need to simplify the current framework and to design a European Communications and Media Act bringing together legislation on the provision of infrastructure, services, content (IPRs, privacy, data protection, digital signatures, harmful content) and on conditions for access to that content (via TV, computer, or telephone networks)."

Until the European Commission can act on Bangemann's call, however, many other Members have stated that they are most interested in seeing what Congress will do with the Treaties and the various liability issues.

During the WIPO Copyright Treaty and Performances and Phonograms Treaty negotiations in Geneva in December 1996, there was significant disagreement among the delegates regarding the best way to resolve issues involving ISP/OSP liability that could be created by implementation of the Treaties, especially given the conflict between the involved industries. Among the most contentious and debated issues at the Conference were the scope of the right of reproduction and the right of communication to the public. Delegates at the Conference were aware of past legislation proposed in the United States attempting to address ISP/OSP liability within the context of the scope of those rights. The previously proposed solutions included: (a) a "notice and take down" system whereby ISPs/OSPs would be exempt from liability for an infringing work residing on systems unless sufficient notice of an infringement was received; and (b) an exemption for those reproductions necessary for the operation of the Internet, including temporary copies for online viewing of material. In the end, it was argued by many proponents of the draft Treaties, and eventually agreed to by the Chairman and delegates, that the Treaties should only set forth rights, and that issues of liability arising from those rights, as well as clarification of the scope of those rights, should be addressed at the national level during the implementation of the Treaties. Now, however, while we are attempting to address the issue of liability and to clarify the scope of the rights, the same proponents argue for further postponement of the limitation side of the agenda. Furthermore, many WIPO delegates reported that they were disinclined to attempt revision of their countries' intellectual property laws without waiting for a global leader to work out a compromise between the affected industries. The United States is uniquely qualified to serve in this role given its position as a world leader in intellectual property and the existence of a strong legal system protecting intellectual property rights within the United States.

As a result, the world is looking to the United States to lead the way in bringing intellectual property law into the Digital Age. Indeed, if history is any guide, the solution produced by the United States Congress will doubtless be widely adopted by the international community.

Question 2. Technology and market practices are evolving rapidly. Does legislation limiting the liability of online service providers or Internet access providers pose the risk of becoming obsolete in a short time, or freezing industry practices and preventing them from evolving as efficiently as possible?

Answer 2. The question has to be answered in light of the legislative proposals considered. If properly crafted, such liability-limitation legislation need not be any more vulnerable to obsolescence than any other legislation applying to rapidly evolving technology. It is for this reason that we prefer approaches which focus on the conduct, on the knowledge and control, of the alleged infringer, rather than on technology-specific concepts. The former path, built on a functional analysis, is quite adaptable to changes in the parties which emerge to perform those functions and to technological changes that take place in how the functions are performed. Standards of business practice, for example, can be written so as to fix in place specific procedures which lose their meaning, and effectiveness, within a couple of years. They can also be drafted functionally in such a way that they retain their vitality.

Question 3. Have any technical means been developed to protect copyright on the Internet by flagging either copyrighted material or infringing material?

Answer 3. Several technologies are in the process of development for identifying or, in some cases, protecting copyrighted materials on the Internet. A basic source for information on basic technologies is "Intellectual Property Protection in Cyberspace: Towards a New Consensus" published by the Information Technology Association of America and updated slightly in "Technological Means of Protection and Rights Management Information (From Source to Savior: How Digital Technology will Save Authorship in the Age of the Internet") by Ralph Oman. As of this date, no new technologies have been added to the catalog listed in the ITM document.

Contrary to wide belief, however, such technologies, while promising, are not likely to be ready for deployment for several years as they are still in their nascent development stage. And even then, much work needs to be done in terms of establishing inter-industry protocols, understanding and testing the technologies under real life conditions, adopting standards, and in general creating the complex infrastructure that will support an effective electronic copyright management system. To cite one small example, there are several competing digital watermarking proposals, and it is not known whether these competing systems will inter-operate once they become widely available or whether it will take several years for one to become the de facto industry standard by dominating the market. Moreover, since the technology has not been subjected to rigorous testing in a networked environment, it is uncertain whether digital watermarking will work once actually deployed in the Internet. Digital watermarking, which identifies copyrighted works, alone would not tell whether the work in question is subject to the fair use or other exemption or infringing. Finally, copyrighted works which are uploaded from analog sources would not, of course, be flagged and could continue to co-exist in the Internet along with marked digital copies.

Question 3a. If so, are any of these systems capable of being implemented without the cooperation of the OSP/ISPs?

Answer 3a. The underlying concept of "digital watermarking" is to filter Internet traffic to detect copies. Flagging, however, does not automatically indicate infringement or piracy. Since such use may be perfectly legitimate, flagging opens a multitude of difficult operational issues. One balance, it may be preferable to employ encryption and electronic wrapping to avoid such judgment calls altogether.

Question 3b. If the liability of OSP and ISPs is limited for copyright infringement, what effect if any do you anticipate this would have on their willingness and/or incentive to cooperate in developing and implementing technical means to protect copyright online?

Answer 3b. Most OSPs/ISPs will have a strong motivation to deploy digital protective technologies. First, the two largest network providers—AOL and MSN—have large amounts of unique internal content they intend to protect. ISPs like AT&T Worldnet may have exclusive deals with providers (e.g., Time) which they want to protect from infringement, while MCI owns part of News Corp., a major content provider. Several RBOCs also own valuable directory information and are part owners of entertainment content (*e.g.*, USWest, Ameritech and BellSouth). Still others host content for owners and maintain ongoing business relationships with them—and an interest in their welfare. The simplistic black and white model which pits network operators against rights holders in pursuit of hostile interests is inaccurate and misleading.

Question 4. What are copyright owners doing today to prevent infringement of their creative works on the Internet?

Answer 4. We perhaps are not the best parties to answer this question on behalf of the content community, but we are told that some of them employ sophisticated search tools and investigative staffs to identify material which may be unauthorized. In addition, a number of the larger copyright owners have developed working relationships with ISPs and OSPs along lines similar to the notice-and-takedown concept. They approach the service providers with questionable material, and the providers quickly investigate material in their space and assist the copyright owners in promptly stopping the infringement. Finally, many are working, with developers of encryption and other security technologies, on imbedded techniques to limit unauthorized use of digital information.

Question 5. What technological means, if any, are available today for service providers to identify infringing copies, without having to monitor the content of transmissions?

Answer 5. As noted above, identifying technologies such as "digital watermarking" are still under development and need to be refined and tested within networks. Standards need to be set, often a contentious and prolonged process. Finally, it must be appreciated that operators and, ultimately customers, cannot be burdened with a requirement to deploy multiple costly and incompatible technologies solely for the purpose of copyright protection to the detriment of network efficiency and subscribers' needs.

Question 6. Have the courts applied the concept of fair use and other exemptions from liability in the copyright law in essentially the same manner in the online environment as they have in the print environment? If not, please cite the cases or cases in which these concepts and exemptions have not been applied consistently in the online environment.

Answer 6. Given the scarcity of written opinions, especially appellate opinions, it is hazardous to talk of consistency in the law. Based on this limited experience, we sense the courts are tending to apply the fair use doctrine generally in the same manner online as in the print environment. We are aware of two cases in which courts have considered claims that Internet conduct was fair use—*Sega Enterprises Ltd.* v. *Maphia,* 41 U.S.P.Q.2d 1713 (N.D. Cal. 1996); and *Religious Technology Ctr.* v. *Netcom,* 907 F. Supp. 1361 (N.D. Cal. 1995). The former applied fair use in essentially the same manner as in the print environment to find online conduct not to be fair use. The latter found issues of fact that precluded summary judgment in favor of the online service provider defendant. Thus, the final application of the doctrine in that case is not clear. Although the Netcom court applied the traditional standard, its discussion of two parts of the standard reflects a sensitivity to the online environment. The court found that, although Netcom's use was commercial, that acting as an online service provider benefited the public. The court also found that the nature of the work was not relevant in light of the limited nature of Netcom's use of the work. However, the court believed that the traditional fourth factor, "effect on the market for the work" was the most important, and that there were disputed facts. Thus, the overall impact of the court's standard appears likely to be very similar to the print standard.

However, some copyright management techniques implemented in response to the WIPO treaties and domestic legislation, such as those which would prevent viewing of material without prior payment, might pose obstacles to fair use in the digital environment.

Question 7. Current copyright laws exempt parties from liability in certain circumstances. For example, section 111 of Title 17 exempts "passive carriers" who retransmit broadcast signals containing copyrighted programming when the carrier "has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission" and whose relevant activities "consist solely of providing wires, cables or other communications channels for the use of others."

Question 7a. Are OSPs and ISPs in a similar position as the "passive carriers" already granted an exemption under our copyright laws?

Answer 7a. We would first disclaim any intent to raise the "passive carrier" exemption of this section as a direct shield of ISP and OSP activities. However, we recognize the appeal of looking at the policy embodied in it as we search for guidelines in the new Internet medium.

In the context of the Internet, the closest parallel to the "passive carriers" currently exempted from infringement liability under 17 U.S.C. § 111 would be straight transmission functions handled by telephone companies and other OSPs and ISPs. For instance, a company such as BellSouth Telecommunications simply provides wires, cables, or other communications channels for the use of others. In that capacity, its services on the Internet are directly analogous to the services of cable systems that retransmit the signals of over-the-air broadcasters.

Confronting the radically new medium of cyberspace, it is vital to bear in mind that the Internet is not simply a "souped up telephone." Thus, reverting to our previous example, services in the nature of an ISP are provided not by BellSouth Telecommunications, but by an amliated company, BellSouth.net. That last company does not simply provide phone lines; instead, its services consist of building up the medium of the Internet itself. Thus, like AOL, MSN, Prodigy, and other online service providers, BellSouth.net originates content, points users towards high-quality preexisting content, and generally provides other, value-added services.

Completing the parallel to cable television, BellSouth.net acts like a cable system when it originates new programming, such as CNN or Nickelodeon. It is crucial to remember that the "passive carrier exemption" of 17 U.S.C. § 111 has no application to those latter new-programming cable services. Thus, although one corporate parent might own both a superstation that retransmits commercial television and a cable news network, current law provides an exemption only to the former conduct. By parallel logic, the extension of a passive-carrier-type exemption to the Internet would cover only the activities of a BellSouth Telecommunications, not to Bellsouth.net.

Further, it should be recognized that ISPs/OSPs carry out new kinds of activities with no direct precedent in either telephony or cable, performing functions which must be considered in the context of the new medium. Whether these partake more of the spint and rationale of Section 111, or fall beyond it, is an analysis which must be carried out carefully based on clearly articulated, updated criteria, rather than on a mechanistic replication of rules which made sense in an older medium. We are confident that as it becomes more familiar with the technology and its operation, the Committee will agree that these new activities should not trigger ISP/OSP infringement liability unless they, too, involve a sufficient degree of control and knowledge to make fair, and practical, a requirement that ISPs/OSPs intervene or be held responsible.

Question 7b. What is your view of creating a similarly limited exemption specifically for OSPs or ISPs? Would that be enough and, if not, could you explain why?

Answer 7b. The answer to subpart (A) essentially sets forth our position as to why a similarly limited exemption for OSPs and ISPs would not be an adequate vehicle to foster development of the Internet.

In addition, as Mr. Neel stated in his testimony to the Senate on September 4, the member companies of USTA occupy a unique position bridging both the worlds of content owners and of the hardware providers. Therefore, even if a passive carrier exemption were adequate to protect the network provider from unwarranted liability—which it isn't as discussed above—such an exemption would do nothing to enhance the protection of the intellectual property owned by USTA members. Protecting our other content owner's intellectual property can be ably accomplished by a mandatory system of notice and takedown.

The phone companies comprising USTA simultaneously wish to foster their new divisions that offer online services while safeguarding their vast portfolios of intellectual property. Included in the latter category are literary works, such as databases and directories; graphical works, software and even audiovisual works, such as those being developed by the telephone companies acting jointly with motion picture studios to pioneer the advent of full motion video on the Internet.

From those multiple perspectives, USTA member companies believe that no better vehicle has emerged to provide legal protection than mandatory notice-and-takedown. As explained to the Committee, that model proteds intellectual property by furnishing an expeditious vehicle to squelch infringement. It also simultaneously provides a safe harbor to networks that carry their fair share of the burden of combating infringement.

Indeed, wearing their content-owner hats, USTA member companies feel that mandatory notice-and-takedown safeguards their intellectual property.

Question 8. Part of the negotiations on this issue that occurred in the House last year revolved around a code of conduct requiring that a service provider adhere to certain operating practices before it could avail itself of any limitations on copyright liability. This code of conduct would have required, among other things, that OSPs inform users of their obligations to respect copyright rights and terminate the access of known and repeat copyright infringers.

Question 8 a and b. Is this code of conduct being followed by online service providers? If so, what parts or all of it?

Answer 8 a and b. We are only aware of the specific practices of a few providers, but our sense is that most have responsible codes of conduct and adhere to them to the benefit of copyright owners.

For example, every AOL subscriber (member) must agree to abide by its Terms of Service, which is part of its member agreement. AOL's Terms of Service states:

> "B. PROPRIETARY RIGHTS.
>
> You acknowledge the following:
>
> (i) AOL, Inc. permits access to Content that is protected by copyrights, trademarks, and other intellectual and proprietary rights ("Rights");
>
> (ii) These Rights are valid and protected in all media and technologies existing now or later developed; and
>
> (iii) Except as explicitly provided otherwise, the TOS, applicable copyright and other laws govern your use of Content (see the Rules, Section D, for details).
>
> You agree that you may upload to the software files, message boards, or otherwise transmit on or through AOL only Content that (1) is not subject to any Rights, or (2) any holder of Rights has given express authorization for distribution on AOL. You represent that if you upload any files, you have the legal authorization to do so. You agree that AOL, Inc. may employ virus-checking technology to protect its system and its members from viruses. By submitting Content to any "public area" of AOL (*e.g.*, message boards, forums, the Member Directory), you grant AOL, Inc. and its affiliates the royalty-free, perpetual, irrevocable, non-exclusive right (including any moral rights) and license to use, reproduce, modify, adapt, publish, translate, create derivative works from, distribute, communicate to the public, perform and display the Content (in whole or in part) worldwide and/or to incorporate it in other works in any form, media or technology now known or later developed, for the full term of any rights that may exist in such Content. You also warrant that the holder of any Rights, including moral rights in such Content, has completely and effectively waived all such Rights and validly and irrevocably granted to you the right to grant the license stated above. You also permit any Member and authorized user to access, display, view, store and reproduce the Content for personal use. Subject to the foregoing, the owner of Content placed on AOL retains any and all Rights that may exist in such Content."

Additionally, AOL's Rules of the Road, which is that part of the member agreement which outlines online conduct requirements, states:

> "(D)(ii) Intellectual property laws apply with equal force to Content found on AOL and the Internet. If you do any of the following you may be liable to the rights holder for copyright or trademark infringement: Copying pictorial images, logos or blocks of text you find on AOL or the Internet; copying excerpts from online news services to distribute to others; taking online discussions of others even when you've participated in the discussion and posting them elsewhere. Basically, you may not transmit over AOL or to the Internet, material that is subject to any person or entity's rights, including copyright, without the express permission of the rights holder. If no specific restrictions apply directly or indirectly to a particular item, however, you may make a reasonable number of copies provided that the copies are only for your personal use and that all proprietary-rights notices are reproduced unchanged.
>
> This means that you may upload to AOL's software files and message boards or otherwise transmit on or through AOL only two types of Content. One type is "public domain" content, which is content that is not subject to any copyright, trademarks, or other intellectual and proprietary rights protection. The other type is content protected by copyright, trademark, moral rights, or other intellectual and proprietary rights, but the holder of those Rights has expressly authorized distribution on AOL or the Internet without restriction. When you obtain permission to submit or post copyrighted material on AOL, your posting should contain a phrase such as "Copyright owned by [name of the owner]; used by permission." The unauthorized submission of copyrighted material that is otherwise subject to any third-party rights, constitutes a breach of our TOS and may also make you liable to the rights holder. Remember, you, not AOL, Inc. or its afffiliates or independent contractors, are exclusively responsible for any liability resulting from infringement of rights arising from such submission or transmission. The maxim "Ignorance is no excuse applies!"

AOL also provides information about copyrights and other legal issues in its Reach Out Zone, an area available to its members to help anticipate and answer their questions. The copyright section states:

"A copyright is the exclusive right to publish, produce, sell, copy, or distribute a produced work—like a book, song, or web site.

Did you know:

- The moment someone creates an original writing, piece of music, computer program, or any other copyrightable material, it is automatically copyrighted under U.S. law. Currently, no notice is required. This means copyright extends to most messages, e-mails, text files, program files, image files, and database files.
- A copyright holder has many different exclusive rights, including the right to copy, make modified versions of, distribute, transmit, publicly perform the work. In general, no one else is allowed to have any of these rights unless the copyright holder gives the person permission through a license.
- In general, if you do any of the following, you may be liable to the copyright owner for copyright infringement: copy pictorial images or blocks of text you find on AOL or elsewhere and put them into your web site; copy excerpts from online news services to create your own customized subject area on your web site; take online discussions of others, even if you've participated in the discussion, and post them on your web site.
- Simply putting a copyright notice with the copyright owner's name does not avoid liability.
- Software is generally copyrighted, so you can't just upload, download or otherwise transmit it in any way without getting permission from the owner. This may also apply to shareware as well. You should check to see what distribution rights the copyright owner has granted."

For a discussion of other aspects of responsible conduct, see the answer to Question No. 13 below.

Question 9. What are your views of the "notice" and "take down" procedures discussed in the negotiations led by Congressman Goodlatte last year?

Answer 9. Though the details of any such proposal are critical, in general we feel notice-and-takedown presents a fair, workable, and very desirable model for offering to a copyright claimant quick removal of allegedly infringing material from a provider's space, while ensuring the service provider is not required to monitor that space. It retains the responsibility for identifying and prosecuting infringements where it should rest: on the rights holder, not on the service provider.

Question 10. Would a mandatory notice and take-down procedure violate the "no formality" requirements of the TRIPS agreement? Please explain why.

Answer 10. USTA has consulted with David Nimmer on this subject. Since 1985, Mr. Nimmer has assumed the responsibility for updating and revising *Nimmer on Copyright*, the standard reference treatise in the field, routinely cited by U.S. and foreign courts at all levels in copyright litigation. Mr. Nimmer's preliminary analysis of the issues, and of the various requirements under international copyright jurisprudence, is that the mandatory notice-and-takedown scheme would *not* constitute a violation either of the Berne Convention or of the TRIPs Agreement.

There appear to be three distinct reasons why the notice-and-takedown scheme is consonant with all U.S. treaty obligations (including obligations arising under the two WIPO treaties currently before the Senate for ratification):

A. *Liability Issues Beyond the Scope of the Treaty*

While in attendance at the Diplomatic Conference in Geneva, Nimmer heard from numerous parties on multiple occasions that questions of OSP and ISP liability are beyond the scope of treaty formulation. In particular, the mantra ran that the purpose of the treaty is simply to define the scope of copyright protection; it is not to define the reach of that protection or to specify which parties might be liable for a breach.

On that basis, the staff of the World Intellectual Property Organization, the delegates accredited to various countries, and U.S. nongovernmental observers representing the content community reiterated time and again that questions of OSP liability should not even be on the table in Geneva and instead should be addressed as a matter of national legislation. *The unanimous position of our interlocutors at Geneva was that the U.S. could completely exempt OSPs and ISPs from any liability whatsoever for copyright infringement consistent with treaty obligations.*

Although entities whose only business interest lies in providing online access might favor such blanket immunity, USTA members take a more nuanced approach. (See the answer above to Question 7.)

Instead, we would urge this Committee to strengthen the hands of copyright owners by adopting a mandatory notice-and-takedown model. It would be the height of irony for content owners to maintain that a lower level of protection for copyright owners (*i.e.*, a blanket exemption) is permissible under the treaty than the higher level of protection (*i.e.*, notice-and-takedown) that USTA is urging. No norms of treaty interpretation that have been called to our attention could support such a counterintuitive—indeed, almost nonsensical—construction. On that basis, we would urge the Committee not to be deflected by casuistry.

B. *Notice to ISPs Is Not a Prohibited Formality*

The TRIPs protocol to the agreement establishing the World Trade Organization requires that signatory states adhere to the 1971 Paris text of the Berne Convention. That Convention in turn requires that "the enjoyment and the exercise of [copyright] shall not be subject to any formality." The question arises whether the proposed mandatory notice-and-takedown scheme constitutes such a prohibited formality.

At first blush, the argument would seem to be foreclosed by the language of the Berne Convention itself. For, even after passage of the proposed amendment, content owners would continue to enjoy subsisting copyrights without undertaking any formality. In addition, they would be able to exercise their copyrights through all manners and means, including the filing of infringement suits, again without any formalities. The sole exception would relate to a lawsuit that a content owner wished to bring against an Internet Service Provider. In that extremely narrow context, the mandatory notice would take effect. Given how circumscribed that notice requirement is when appreciated in context, it cannot fairly be stated that it subjects "the enjoyment and the exercise of copyright" to a prohibited formality.

The semi-official guide to the Berne Convention defines the term "formality" as "a condition which is necessary for the right to exist." By no stretch of the imagination could it be maintained that notification to an ISP constitutes a condition necessary for the copyright owner's rights to exist. Instead, it stands as a prerequisite solely to the filing of lawsuits in a very narrow context. Accordingly, TRIPs, with its embedded incorporation of the Berne Convention, does not affect the proposed mandatory notice-and-takedown model.

In addition, it is worth emphasizing that the bar on formalities applies only to works of foreign origin. As the guide to the Berne Convention states, each "country remains absolutely free to subordinate the existence or exercise of the rights on that work in that country to such conditions or formalities as it thinks fit: It is purely a matter of domestic law. But, outside the country of origin, a Union author may demand protection throughout Union countries free of the need to comply with any formality there * * *." Accordingly, even if the argument had any substance that notice-and-takedown constitutes a prohibited formality, that argument would be beyond the purview of such organizations as the RIAA, the MPAA, and the Software Publishers Association. Instead, it would need to be urged by owners of French movies, Israeli songs, Argentinean software, etc.

C. *Precedent Strongly Supports the Permissibility of Formalities*

U.S. law is already replete with numerous notice obligations. It is noteworthy that no Congress has seen fit to repeal those notice requirements in order to comply with our treaty obligations. Among many other provisions, see 17 U.S.C. Sec. 110(4)(B)(i)–(iii).

For instance, it has long been a statutory requirement for copyright owners to file a notice in order to recover license fees for music that is subject to the mechanical-recording compulsory-license provision. Congress returned to that scheme recently when enacting the Digital Performance Right in Sound Recordings Act of 1995. Notwithstanding the pendency of both TRIPs and the Berne Convention at that date, Congress did not see fit to dispense with the notice requirement at that time.

Even more tellingly, Congress actually implemented some of the U.S.'s Berne Convention requirements through a massive notification scheme. In particular, the Uruguay Round Agreements Act—the very instrument designed to bring U.S. law into compliance with TRIPs standards—incorporates an extremely lengthy provision requiring copyright owners to file a notice of intent to enforce restored copyrights in order to rescue their works from the public domain.

It is most instructive to compare the notice model just mentioned and the ISP notice-and-takedown scheme that is before this Committee. In the context of the Uruguay Round Agreements Act, the notice of intent to enforce a restored copyright is absolutely mandatory upon the copyright owner in order to proceed against "reliance party" who may have exploited the work in the past; absent filing of that notice, "the enjoyment and exercise of the copyright" against the entire class of individuals who have been exploiting it in all manner and media is nil. By contrast, content owners subject to a mandatory notice-and-takedown scheme would have available to them the full panoply of rights that current law affords. The sole exception relates to a narrow area of enforcement, namely, against online service providers. Copyright owners may still enforce their rights against the infringer and others who may be contributorily or vicariously liable.

It could scarcely be maintained that the massive notice scheme recently mandated by the Uruguay Round Agreements Act is constitutional, whereas the far more limited notice scheme contemplated by the USTA legislative proposal is infirm. Accordingly, unless Congress wishes to reevaluate its recent handiwork in implementing TRIPs, the conclusion is irresistible that mandatory notice-and-takedown does not fall afoul of TRIPs "no formality" requirement.

Question 11. The recent court cases of *Microsoft* v. *Ticketmaster and TotalNews* have raised the issue of whether contributory copyright infringement liability applies to hyperlinking. In your view, does hyperlinking pose any risk of contributory copyright infringement liability if the site which is linked contains infringing material? If so, what effect, if any, do you think this will have on the freedom of users to hyperlink?

Answer 11. The *Ticketmaster* case involves trademark infringement and unfair competition issues associated with the use of multiple hyperlinks from a Microsoft web site to a Ticketmaster web site. The *Ticketmaster* case does not yet include any claims of copyright infringement. The *TotalNews* case involved a plethora of claims including trademark infringement, false advertising, unfair competition, tortious interference, and copyright infringement. The copyright infringement argument was primarily directed to the republishing of the works at the TotalNews web site without permission. Since the case has settled, we will never know whether any of the alleged claims were justified. It is worth noting, however, that a federal court recently held that electronic reproductions in the Nexis databases of collective works of individual copyrighted works were protected under Section 201(c) of the Copyright Act. Thus, because *TotalNews* involved the "reproduction" of a collective work through framing—described below—it may be that the alleged copyright infringements were not violative of the Copyright Act.

The basis of the claims against TotalNews involved a technology known as "framing." Frames are inherently different from hyperlinks. A frame is literally a window into another location of the current web site, or even an entirely separate site. As such, the content of the framed site becomes part of the content of the current site, and thus may be subject to liability for a copyright infringement under existing law. A hyperlink, however, is nothing more than a piece of text or graphics on a web site that is associated with the address to another web site. Many common Internet browsers are capable of automatically connecting to the other web site when an Internet user proactively "points and clicks" on the hyperlink text/graphic. Unless the hyperlink provider also controls the web site that is addressed by the hyperlink, the hyperlink provider has no control over the content of the linked site. As with all other forms of speech involving the opinions of a speaker, the speaker (in this case, the hyperlink provider) should not be held liable for any infringement taking place at a reference location that is not under the speaker's control.

This last point is particularly important. Under current law, in analogous media of expression, such as newspapers, movies, television and books, the mere provision of speech by one person which results in another person's access to illegal material is not itself illegal. This is particularly true where the speaker is not an active participant in the illegal activity. For example, no one would be found guilty for telling a known bank robber that there is "easy money" in a local bank. Likewise, no one could be held liable for recommending that another person visit a web site that just so happens to include infringing material. If the latter result were not the case, movie reviewers would be liable for any copyright infringement that occurs in a movie that they recommend. Holding hyperlink providers liable for copyright infringements on linked sites would violate the First Amendment's protection of those providers' free speech rights.

In addition, the contribution of hyperlinking to the rapid increase in Internet use cannot be over-estimated. Indeed, with the exception of e-mail, none of the various applications of the Internet came into widespread use before the introduction of the World Wide Web. The architecture of the Web is based on hyperlinking; it would be extraordinarily difficult to navigate the Web without it. It is no exaggeration to suggest that if the use of hyperlinks were chilled by fear of liability for copyright infringement, it would seriously undermine growth of the Web—and its increasing contribution to global commerce.

Moreover, while content providers suggest that hyperlinks to infringing works may result in lost jobs to creators, any loss must be balanced against the rapid growth of jobs in Internet-related industries in such areas as hardware, software and content. For example, the services of the dozens of Internet search engine firms that have arisen in the last few years is based on hyperlinking. It is also worth noting that these jobs are quite quantifiable, while those claimed to have been lost due to hyperlinking to infringing works are generally difficult to separate from those lost because of other factors, including competition, economic conditions, business acuity and changing public tastes.

Question 12. In the physical world, if someone publishes a directory that references or cites to a work that infringes a copyright, my understanding is that the directory itself is not an infringing work nor is the author of the directory subject to liability for copyright infringement.

(a) Is my understanding correct?

(b) Should hyperlinking be treated any differently?

Answer 12a and 12b. Yes, your understanding of the law is correct. As your question suggests, and as specified in the answer to your prior question, hyperlinking should be treated no differently under the law than its closest analogy in the "real world." Indeed, in this context it is important to point out that laws applicable in the tangible world apply to the Internet. Generally, activity on the Internet should be treated no differently than similar or identical activity in the physical world, except with respect to unique issues, such as those relating to the nexus that the Internet creates with various jurisdictions. For example, just as the post office or a commercial package service is not liable for infringing material inside an envelope or box, a hyperlink provider should not be liable for an infringement of which it has no specific knowledge or over which it has no control. This conclusion is fortified by the recognition that even after a link to a non-infringing site is made, its content may be changed the next moment to include infringing material completely without the knowledge of the linking party.

Moreover, just as subjecting the directory author to liability would violate his or her free speech rights, hyperlink providers should be accorded no less protection under the U.S. Constitution.

Question 13. Please describe generally what happens now when your company, or member companies, discover an electronic bulletin board service or an Internet Web site with pirated works?

Answer 13. Among the limited number of companies with which we are familiar, the procedures of AOL are representative:

Currently, if the BB service resides on AOL, *i.e.*, a message board, and it is notified about a problem, AOL follows its standard copyright investigation procedures. If a web site is on AOL space, *i.e.*, a member web page, and AOL is notified of a problem, it will also investigate.

The ordinary review process follows:

Upon receipt of a copyright infringement allegation, an individual authorized by AOL obtains from the complainant to the extent possible the following documentation in writing:

1. The name of the copyright owner.
2. Confirmation that the complainant is indeed the copyright owner or is an authorized representative of the owner with binding authority.
3. A representation that the owner has reviewed the material and has formed the opinion, based on review of copyright law and the particular facts, that the material infringes the owner's work and that the poster has no basis in fact and in law for a defense, such as fair use, lack of originality, factual material, etc.
4. Proof of copyright ownership by providing registration documentation or at a minimum the portion of the work that indicates copyright ownership.
5. Precise location of the material such that AOL can locate the material and the poster's e-mail address, if possible.
6. Date of discovery and date and form of their notification to AOL.
7. Indemnification for all loses arising from any misrepresentation or material omission contained in claimant's letter. AOL may, at its discretion, request financial information to evaluate the indemnification.

If the AOL representative is unable to obtain this information, the matter is referred to its TOS Compliance attorney.

Upon receipt of the above information in writing, AOL attempts to determine who posted the material at issue and contact that individual by both e-mail (via screenname used in post and master account screen name) and overnight carrier. AOL typically indicates that a claim of copyright infringement has been alleged and the individual must contact AOL at a toll-free number as soon as possible but no later than within 24 hours following delivery of the overnight notification letter or else AOL may delete the offending materials. AOL requests the poster to voluntarily consent to AOL's deletion of the material unless the poster can demonstrate adequately that the poster's material was authorized or justified by an applicable defense, *e.g.*, fair use.

If the poster will not consent, AOL asks the poster to deliver to a designated AOL representative, within 24 hours following delivery of AOL's notification letter, a letter that represents that the poster has formed the opinion, based on review of copyright law and the particular facts, that the material does not infringe the complainant's work and that the poster has a basis in fact and in law for a copyright defense, such as fair use, lack of originality, factual material, etc.

If AOL has not obtained this documentation from the poster within 24 hours of delivery of AOL's notification letter, AOL may remove the offending materials and send, again by e-mail and by overnight mail, documentation of the actions taken.

If the poster, by letter, disputes the complainant's claim and refuses to consent to AOL's removal of the material, AOL may go ahead and remove it, may leave it in place, or may refer the issue to a neutral third party arbitration forum, such as Virtual Magistrate, depending on the circumstances.

Question 14. What is the evidence showing that our current copyright laws are making the growth of the Internet suffer?

Answer 14. Perhaps the best response is to note that it's not settled what the current copyright laws are as applied in the digital networked medium. This uncertainty is the reason the copyright owners originally sought "clarification" from Congress and the Administration via legislation considered last year. If the copyright laws are judicially or legislatively interpreted to impose upon service providers the liabilities copyright owners sought, some of which liabilities may well be held to flow from the unelaborated WIPO treaties, the impact will be severe. Whether the threat of such liability is now making the growth of the Internet suffer is a matter which is difficult to assess and to quantify, as noted in our response to Chairman Hatch's second question above.

Perhaps the more interesting question is whether the claimed current lack of protection for proprietary content on the Internet is really such a deterrent to the posting of such materials by owners that they will bar their materials from being used. In some cases this may hold true, but as our experience grows we are also presented with contrary evidence. For example, a university press which posts its products for downloading on the Internet recently reported that this step was followed by a significant increase in the sale of its hardcover publications. It seems many readers who sampled the wares online and wanted to read the entire work did not consider downloading it and reading it on a computer monitor a satisfactory substitute for the real thing.

Similarly, Disney and Time Warner, two firms not known to be fools in the marketing area, freely post hundreds of images of their most valuable characters on their Web sites, inviting visitors to download them for their personal use. Granted, Disney, for example, includes an exhaustive copyright notice limiting further use of these images. It is clear, however, that the company knows the limitations are likely to be widely flouted and that they will be largely unenforceable. This compels us to conclude that the company doesn't really intend to enforce them when the intended audience, children, overstep their bounds. The notice is rather included to preserve Disney's continuing right to enforce its copyrights despite the placing of its assets on the Internet.

The conclusion is inescapable: Disney knows the Internet, even without embedded technology protecting its distribution rights, even without restricted site access except to paying members, is much more of an opportunity than a threat. It knows that the astounding exposure it receives (as one of the five most popular sites on the global Internet) is worth far more in increased sales of its products than is any lost revenue it might suffer from free downloads.

By this observation we do not mean to argue that there should be no protection for copyrighted material on the Internet, nor that all owners are similarly situated to Disney or Time Warner. But we do suggest that many copyright owners overreach when they claim they will suffer catastrophic losses unless Congress ensures they get paid from someone (read, deep pockets), whenever their material transits the global information infrastructure.

Likewise, we believe when they claim that without copyright's promise of financial reward, writers will not write, composers will not compose, and artists will not paint, they risk demeaning the true nature of creativity; they forget that the best, the most enduring works of creativity are produced in response to inner personal drives which will continue to find expression whether the artists labors in a mansion, in an unheated garret, or in a kindergarten art class.

That brings us to our final point—if the copyright owners succeed in diminishing the utility and raising the price of the global digital network to serve their own goals, among those who suffer most will be the millions of ordinary users for whom the Internet is a historic opportunity to present to the world at large their own poetry, photographs or music, without having to control chains of wholesale and retail distribution, and without having to convince a hard-nosed executive that their work has commercial merit. We ask the Committee to remember that it is among these rapidly increasing users, among our people generally, that the vast majority of creativity occurs, and it is in these seed beds that commercially successful artists of the future will be nurtured.

Question 15. Under what circumstances, if any, could an individual "browsing" the Web be subject to liability for copyright infringement?

Answer 15. While this issue, like many others in the digital environment, remains unsettled,[25] we would answer, in general, "none." Since electronic copying of data is necessary in order to facilitate transmission and perception by the human eye in the client-server environment of the World Wide Web, it is hard to imagine why an individual should be held liable for copyright infringement for the simple act of browsing sites on the Web. Without such "copying", technically known as "client side caching," works of material could not be made visible to the user. The Internet simply would not function otherwise. Such caching enables end user perception and aims to make the most efficient use of the finite bandwidth available on the Internet.

Some argue that the reproduction made when one browses must be authorized by the rights holder or permitted by national law. Others argue that such a copy is not a reproduction for the purposes of the right of reproduction under the Berne Convention. Others advocate a third view, that such copies are reproductions, but that owners give implied consent to such copying when they place their material on a web site. If such owners wish to prevent copies from being made without some sort of relationship in place, then they can use encryption and other technical solutions to authorize users to access their sites and make copies of the pages in order to view them.

Question 16. Several witnesses suggest that "innocent" transmitters, or those who unwittingly distribute infringing material, should not be held liable for copyright infringement initiated by others. Would this represent a significant change to the Copyright Act, which does not require culpable knowledge for imposition of liability, but instead provides for limited statutory damages or mitigation of damages?

Answer 16. Clarification of the scope of the right of reproduction and the right of communication to the public with regard to ISP/OSP liability would add a new section to the Copyright Act.

This new section would limit liability for temporary copies made during the transmission, or temporary viewing, of works that are necessary for the operation of the Internet and for the right of communication to the public where the service provider does not have knowledge or control over the material transmitted or communicated.

The amendments would serve to update the Copyright Act for the Digital Age. Rights holders would retain their full rights under the existing law; the amendments would merely clarify that rights holders do not possess an exclusive right to transmissions made pursuant to the operation of the Internet over which the service provider does not have knowledge or control. It is important to understand that this limitation of liability contemplates only the potential unauthorized copies made by devices; any person other than one providing network services and facilities who causes an unauthorized copy to be made—with or without culpable knowledge—would be subject to liability for direct infringement, or vicarious or contributory liability, as the case may be, under the existing law.

In addition, to the extent that an infringing work located on a host computer can be located once that host's manager is aware of the infringement, the proposed legislation provides for "notice and take-down" procedures. These procedures properly balance the rights of content creators/owners and the interests of facility providers. The provision does not eliminate liability under the Copyright Act: once a facility provider has been properly notified of a potential infringement, such provider is subject to liability for not removing the material from its computer.

Any other system requiring monitoring of the Internet would raise serious, and often illegal, privacy concerns that are not in the interest of the public, the consumer, or the service provider.

Question 17. Are the online service providers and Internet access providers seeking an exemption from direct liability for copyright infringement or just from contributory or vicarious liability?

Answer 17. The members of the AHCC are seeking an exemption from liability arising out of the conduct of third parties under any theory of liability—direct, contributory or vicarious. It is important to emphasize that this does not mean that online service providers and Internet access providers seek immunity for infringing conduct with respect to acts for which they should not be immune. For example, immunity should not attach to content that the service provider originates, or obtains from others and offer as part of its service offering. In this sense, the service provider would be judged by ordinary standards of liability. Rather, if the acts charged to the service provider are simply the "acts" of its system, acting at the behest of another, the theory asserted by the plaintiff should not matter, and liability should not attach.

The concern of the Coalition with respect to direct liability arises out of the fact that the doctrine is a doctrine of strict liability, that does not consider knowledge or intent. At least one case, *Playboy* v. *Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993), found a bulletin board operator liable as a direct infringer because the operator's service "supplied a product containing infringing material." The court ruled, as a matter of law on summary judgment, that knowledge and intent were not relevant to direct infringement, as long as the bulletin board's computers "displayed" and "distributed" infringing material. The court found "it does not matter that Defendant Frena claims he did not make the copies himself."

Fortunately a district-court ruling does not settle this uncertain area of law. Liability merely on the basis of the automatic "acts" of the service provider's computer system at the behest of a third party should not give rise to liability under a theory of direct infringement any more than it should give rise to liability under a theory of contributory or vicarious infringement. In short, the conduct of the service provider, not the theory of liability, should control whether a service provider qualifies for immunity.

Question 18. If OSPs are exempt from the universal service surcharge levied against telecommunications services because they do more than common carriers, should they at the same time be granted a special exemption from copyright liability on the grounds that they act just like a common carrier?

Answer 18. Internet and online service providers should receive the same exemption from M copyright liability that Congress has determined appropriate for common carriers, because functionally they are no better situated than are common carriers to prevent copyright infringements.

Where they are performing a network service function, as described in Section 512(a)(1) of S. 1146, Internet and online service providers, like telephone companies, are serving as intermediaries for vast numbers of third-party communications that travel across their networks instantaneously, in digital form, and are often compressed or encrypted. Under these circumstances, it is not possible for Internet or online service providers to detect infringing communications, much less to prevent them.

Where Internet and online service providers furnish server space to which third—parties may freely post content, these providers lack knowledge of whether particular communications are infringing. Content owners and their licensees are in the best situation to detect such infringements, and service providers stand ready to work cooperatively with them to remove, disable or block access to infringements that these parties bring to service providers' attention.

The analogy to the Communications Act of 1934 suggested by this question is not applicable. The Copyright Act, unlike the Communications Act, has no provisions according a special status to common carriers. Furthermore, the relationship of ISPs and OSPs to the telephone network—which goes to the heart of the reasons for the enhanced services exemption—is not relevant to ISPs' and OSPs' ability to detect and prevent infringements. For example, the Federal Communications Commission's decision earlier this year regarding ISP and OSP payment of universal service charges was based in large part upon whether these providers "alter the format of information through computer processing applications such as protocol conversion and interaction with stored data.[1]" Although of central importance in construing ISPs' and OSPs' universal service obligations within the statutory framework of the Communications Act and its universal service provision, 47 U.S.C. § 254, automatic alterations in the format of communications have no bearing on service providers' ability to prevent infringements.

Question 19. Should there be any difference in copyright infringement liability for online services provided by commercial providers and by universities or libraries?

Answer 19. During House Judiciary Committee discussions in Spring, 1996, it was generally agreed that operators (including schools and libraries) should act "promptly" and "expeditiously". Representatives of these institutions did not disagree. Even within the private sector, it was realized that there would be variations in response time since operators, particularly in rural areas, may lack the resources for rapid turnaround in the evening or weekends. Whether operators have acted in a manner consistent with the Acts' provisions will, in the end, be determined by the courts interpreting a specific fact situation.

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[1] *In the Matter of Federal-State Joint Board on Universal Service, Report & Order*, C.C. Dkt No. 96–45, at ¶789 (May 7, 1997).

Question 20. In the debate over whether Congress should create a new type of property protection for databases, opponents argue that those who seek legislation bear a heavy burden of proving why legislation is necessary. Do you think that those who seek legislation limiting OSP/ISP liability have met their burden of proof?

(a) How has that burden been met any differently in this case than with those who seek database protection?

Answer 20. We do not here express an opinion on database protection proposals, nor do we here endorse or reject any arguments or "proofs" used in the debate on those proposals.

That said, it is not clear what burden of proof is meant, nor why it is "heavy," or any different from the burden which the copyright owners must bear on their part. More to the point, in a legislative forum, both sides bear instead the burden of persuasion.

Thus, we have clearly addressed the circumstances and reasons why we feel the Committee should adopt a reasonable ISP/OSP liability provision. We have acknowledged that we are vitally concerned with the uncertainty in the law and the threat of virtually unlimited liability for third-party actions. In this respect, our foundation is no less secure than that of the copyright owners, who cite huge losses to commercial pirates in other media. We are not seeking any limitation of liability for pirates, for those who intentionally infringe. And we have seen no evidence that the kinds of unauthorized downloading trumpeted in the owners' testimony has any significant financial implication at present. Such proof, after all, would have to show that those who download for free, if they could not do so, would instead desire the product so much they would purchase it in tangible, analogue form through normal commercial channels, a questionable proposition. The owners' real ground is, like ours, the threat of future loss.

Question 21. In 1993, the Ninth Circuit in *MAI* v. *Peak* decided that when a computer repair company turned on a computer to perform maintenance work, a copyright infringement occurred because the repair worker was not a licensed user of the software and caused a RAM copy of the software to be made. In the 104th Congress the House—but not the Senate—passed a bill to respond to *MAI* v. *Peak*, and provide a limited exemption from copyright liability for copying a computer program "solely by virtue of the activation of a machine" in order to repair and maintain a computer. What is your view of such a limited exemption from copyright liability?

Answer 21. Before addressing the question, we note that the House legislation referred to 5 was itself much too narrow, in that it applied only to the owner, rather than to a rightful possessor, of the software, and only to the activation of the computer.

The conclusion that a RAM copy, as described in the question, should result in copyright liability reflects the unfortunate view that copyright rules are written in stone by the finger of God and are to be applied with ritualistic exactness, even when the result is absurd. The AHCC instead recognizes copyright as a living organism which can adapt to new environmental conditions, and which has historically done so at important technological turning points. (See also, David Nimmer, Brains and Other Paraphernalia of the Digital Age, 10 Harv. J.L. & Tech. 1, 21–25 (1996).

Those companies most concerned with the *Peak* case's implications for the essential business of maintaining the nation's ability to use computer tools tailored their request for relief narrowly, only to find the final House language completely insufficient even for that purpose. Their strategic positioning does not imply, however, that a broader exemption is not also appropriate to reasonably adapt copyright to the new networking actions and service provider roles which we are asking the committee to consider as it reviews the WIPO treaty implementing language.

Question 22. Nonprofit libraries are permitted under the copyright laws to lend computer software. Borrowers are unable to use the borrowed program without downloading it into the random access memory (RAM) of their computers 50 that they are able to read or use it on their computer.

(a) Does the making of a temporary copy in RAM implicate any rights of the copyright holder and, if so, what are the risks of copyright infringement liability on the part of the borrower?

(b) Should the liability for copyright infringement for borrowers of computer software be clarified and, if so, what would you recommend?

Answer 22a and 22b. Certainly the making of such a temporary copy does raise questions of infringement, and under *MAI* v. *Peak* a borrower of software could be held liable for its use. But as we have argued elsewhere, such copies should not of themselves be deemed to subject users, whether borrowers or not, to liability for infringement. See the answers to nos. 15 and 21, and in particular the Nimmer article referenced in the answer to the latter. In addition, subjecting the borrower to liability is completely inconsistent with the essential function of libraries. To the extent libraries are authorized to lend software, borrowers should be deemed authorized to use it, under appropriate restrictions.

Question 23. Many Internet browsers cache "locally" by storing recently visited Web pages in the user computer's RAM to save time and burden on the Internet infrastructure from having to access the actual site. Caching also occurs on the server level, called "proxy" caching, so that OSPs, may store the most frequent requested sites on their own computer. When a user seeks a particular site, the online provider delivers a copy from its own computers' memory rather than from the Web site in question. Caching is considered essential to the successful functioning of the Internet.

Question 23a. Does "caching" implicate any rights of the copyright holder and, if so, what are the risks of copyright infringement liability on the part of the computer user or online service provider?

Answer 23a. Given the absence of meaningful judicial guidance on caching, it is unclear whether this essential, automated, function will bring infringement liability down upon ISPs/OSPs and users. Clearly, it can be claimed that such caching constitutes a reproduction, and that such rights as distribution are involved in the transmission of digital information from web sites to server computers and from server caches to user computers. While we disagree, these arguments have been made by content owners in both judicial and legislative fora, and the risk is real. By contrast, it can also be argued that such actions should be deemed fair use, since they simply speed up a user's access to materials to which he/she would still have access absent caching. Indeed, the public interest is served because this practice unburdens the network of considerable traffic, greatly increasing the utility and reliability of the system.

Question 23b. Should the liability for copyright infringement for the automatic "caching" engaged in by computers be clarified and, if so, what would you recommend?

Answer 23b. Yes, caching is of such importance to the functioning of the digital network that its liability implications must be squarely faced and decided. Consistent with our answers to Questions 15 and 21, we feel it makes no sense and serves no purpose—other than expanding the number of defendants copyright owners can drag into a lawsuit—to affix infringement liability to such actions. ISPs/OSPs program their servers to cache pages and update them periodically without further human intervention, based on usage algorithms and the changing technical needs of the network. They do not know what the stored digital data represents, nor could they stay abreast of changes made to those pages from minute to minute by their authors and reflected to a greater or lesser degree in the periodic cache updates. Whether caching is deemed fair use, folded into the definition of conduit functions, or explicitly included in limitation language, it should be taken off the liability table.

Question 24. How many lawsuits have copyright owners filed against America Online, Inc. (AOL) for copyright infringement by your subscribers?

Answer 24. Three, in the last twelve months.

Question 25. How much did AOL pay last year in damages for copyright infringement by its subscribers?

Answer 25. AOL paid no damages last year.

RESPONSE OF GEORGE VRADENBURG, III TO A QUESTION FROM SENATOR THURMOND

Question 1. You state in your prepared testimony that the world is watching how we in America balance the application of copyright laws to Internet technology. Please explain how what we do in this area will have global implications.

Answer 1. The impact internationally of the United States adopting national legislation limiting or exempting Internet and Online Service Providers ("ISPs/OSPs") from liability for certain potential acts of copyright infringement would be that other nations would seek to implement equivalent legislation with respect to their ratification of the Treaties, thereby largely resolving this issue on a worldwide basis.

The United States has some of the strongest intellectual property laws in the world. The intellectual property that those laws protect has become a significant and growing part of the United States economy. Commissioner Lehman has emphasized at recent Hearings on the "WIPO Copyright Treaties Implementation Act" (H.R. 2281) and the "Online Copyright Liability Limitation Act" (H.R. 2180), before the House Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, that the world is watching how the United States implements the Treaties and protects intellectual property in the digital environment. Jack Valenti, President of the Motion Picture Association of America, recently stated at a press conference sponsored by the Creative Incentive Coalition, that "[t]his treaty is so tilted toward us that no other country is going to ratify it if we don't."

The lead of the United States in crafting worldwide solutions for handling intellectual property, especially involving the information society, is at risk, and will certainly be lost if the United States does not at least address the issue of ISP/OSP liability during the implementation of these Treaties. Martin Bangemann, Member of the European Commission, in his recent call for a comprehensive information society policy stated:

> We will undoubtedly need to simplify the current framework and to design a European Communications and Media Act bringing together legislation on the provision of infrastructure, services, content (IPRs, privacy, data protection, digital signatures, harmful content) and on conditions for access to that content (via TV, computer, or telephone networks).

Until the European Commission can act on Bangemann's call, however, many other Members have stated that they are most interested in seeing what Congress will do with the Treaties and the various liability issues.

As is often the case, the United States' position on the liability issue will have not only an effect on the adoption of laws abroad, but will significantly impact the global economy. As the producer and exporter of a huge percentage of the world's intellectual property, the United States must lead the way in implementing intelligent, workable, and well-crafted legislation that equitably balances the interests of all parties.

In addition, the global nature of the Internet—and the fact that the majority of the Internet's content emanates from the United States—will mean that the policies we put in place will have an immediate impact on the global community and will rapidly proliferate around the world. As a result, it is important that the United States implement the proposed Senate legislation now for two reasons: first, less comprehensive legislation will lead to mistakes and inadequacies that would, as explained, proliferate around the world resulting in peril to rights holders, the Internet, and the global economy increasingly dependent upon them. Second, if the United States does not act now, countries with less sophisticated intellectual property laws will have an inordinate influence on global Internet policy.

Responses of George Vradenburg, III to Questions From Senator Grassley

Question 1. As you know, the removal of material from the Internet has been dealt with by this Committee before. In July 1995, I chaired a Committee hearing concerning my legislation to remove child pornography and indecent material from the Internet. My concern then was not about material that breaks the copyright laws, but rather about material that harms children and promotes the sexual abuse of minors. At this hearing, we had a gentleman, Mr. Cimmins, an America Online subscriber, testify that America Online was not effective in removing child pornography, even though he made the company aware of it. My question is, what are America Online's current policies concerning offensive material? Are there written guidelines, and if so, what assurance do your subscribers have that they are followed?

Answer 1. Yes, there are written policies embodied in AOL's Terms of Service (TOS), governing its relationship with its subscribers. These terms of service prohibit certain sexually-related conduct and materials, including child pornography. When notified of infractions, AOL does adhere to this policy with respect to its members. The Terms of Service also advise members that AOL may contain other materials not suitable for minors, and that it cannot be responsible for content found once the member accesses the Internet, but it provides users its own parental control screening mechanism which can limit access to various AOL sites and fora. Further, it offers, via download, other state-of-the-art software tools by which members can help control the kinds of material to which they and others on their accounts are exposed as they move through the global network.

Question 2. Can you tell me how many complaints America Online receives about material? What is the nature of these complaints? How many of these complaints have resulted in actions by America Online?

Answer 2. America Online does receive complaints about the receipt of offensive materials. It attempts to investigate all of them. The complaints, if verified, result either in member discipline, or, when appropriate under the law, referral to law enforcement agencies, or both. For example, AOL has recently worked with the New York State Attorney General's office and the US Customs Service in the bringing of criminal complaints relating to such materials. AOL would be glad to meet with you or your staff to explain in further detail AOL's experience with these kinds of complaints and its cooperation with law enforcement.

Question 3. Do you know if your policy is typical of similar service providers?

Answer 3. No.

Responses of George Vradenburg, III to Questions From Senator Feinstein

Question 1. You say innocent and powerless transmitters should not be held liable. But what about when they are notified of the infringement? At that point, they are no longer blissfully innocent. And, correct me if I am mistaken, but aren't the service providers such as America Online capable of eliminating an individual's ability to infringe, so you are not, in fact, completely powerless?

Answer 1. We agree with the Senator that when ISPs and OSPs receive sufficient notice, and are protected against the consequences of acting on notices which are false or mistaken, we are willing to cooperate expeditiously to remove the offending material. This is the substance of the notice-and-takedown procedure which we have consistently advocated. The issue of "constructive notice," however, is quite different, given the difficulty of anyone but the owner knowing what particular uses are authorized, or indeed what material is actually covered by what copyright.

The question of what steps can reasonably and economically be taken by ISPs and OSPs to remove from their services or limit access to specific material is a complex one. Certainly, within their service spaces, they do have a significant measure of control, and should be expected to cooperate expeditiously with content owners under proper procedures. The degree of that expectation, however, varies according to the facts of the case. We do not suppose that the Committee would require us to shut down significant parts of our operations to try to ensure that no member by any means could get access to an outside pirate site, for example, or to eliminate web-site hosting because we cannot monitor what members post to those sites at any time of the day or night. This is why we have argued for a general limitation such as "technically feasible and economically reasonable" at appropriate places in proposed legislation, coupled with a delineation in report language of several examples of current activities, such as web site hosting, which are meant to fall outside that expectation.

Question 2. You say that service providers must be willing to help remove infringing materials "where it is legal * * * to do so." When would it not be legal to do this?

Answer 2. The quoted statement makes reference primarily to constitutional, statutory and common law protections for the rights of those who post materials and who do not consent to its removal. For example, one can envision many instances in which removal of allegedly infringing materials would subject the provider to civil liability, cases in which the provider may be subject to broad constitutional restrictions as a public or governmental institution, or cases in which tampering with a communication, an e-mail, for example, would contravene criminal law and violate individuals' privacy.

Question 3. Some of the copyright holders are asserting that service provider liability isn't a real problem.

Question 3a. Has America Online been sued for copyright infringement?

Answer 3a. The answer assumes that the questions are directed to suit for copyright infringement for the acts of the service's subscribers. AOL has been sued three times during the last 12 months for copyright infringement of its subscribers.

Yes, there are a number of other suits. For example, Netcom has been sued by the Church of Scientology. And CompuServe is the defendant in a class action by models who claim that their pictures are uploaded by members without permission and that CompuServe has failed to take proper steps to screen.

Question 3b. Have telephone companies been sued for copyright infringement? If so, what were the circumstances of the suit? To your knowledge, have other service providers been sued for copyright infringement?

Answer 3b. Given how recent the phenomenon of online services is in our society, it is noteworthy that numerous cases have already been filed against service providers. In fact, the summary from the United States Copyright Office on the subject lists seven reported cases directly concerning alleged copyright infringement in an online environment.

None of those cases has risen to the appellate level. Nonetheless, it is only a matter of time before a case wends its way to the court of appeals. None of the particular defendants targeted in those actions consisted of a telephone company. Nonetheless, that circumstance furnishes no immunity to those telephone companies, any more than the fact that none of those cases has been filed in Tennessee, for example, could thereupon be held to immunize ISPs who limit their services to an operation in Memphis. The relevant inquiry is whether telephone companies or others who function as ISPs risk finding themselves named as defendants in copyright-infringement litigation. Based on the experience to date, the unqualified answer is "yes."

USTA members' ability to operate as Internet Service Providers (ISPs), as well as the ability of the Internet itself to grow and fulfill its promise, depends on a reliable business environment. The threat of unwarranted litigation by copyright owners threatens to wreak havoc to that environment Such claims are typically rooted in users transmitting or "posting" allegedly infringing materials, without any knowledge on the part of the ISPs. Nonetheless, under theories of "vicarious liability" and "contributory infringement," ISPs—many of which are perceived to have deep pockets—have been and will continue to be targets of copyright lawsuits based on conduct by users that the ISPs could not reasonably be expected to control. Unfortunately, that State of affairs comports with the Clinton administration's own conclusion a couple of years ago that, notwithstanding legitimate contrary arguments, "the best policy is to hold the service provider liable." Intellectual Property and the National Information Infrastructure at 114, 117.[2]

The copyright doctrine known as vicarious liability creates a reasonable apprehension that ISPs may be forced to pay large damages for their simple act of transmitting signals. The hallmark of that doctrine is that it applies even in the absence of any knowledge that the defendant's facilities were used to propagate infringing matter. Thus, the doctrine has ensnared parties ranging from proprietors of dance halls to owners of the grounds where a swap meet takes place. That line of cases affords the argument that simply providing the premises on which infringement occurs may suffice as a basis for holding the proprietor vicariously liable. Because an ISP can be argued to provide the analogous "premises" on which cyber-infringement occurs, some argue that it should be held correspondingly liable.

When the logic of the "dance-hall cases" and their progeny is squarely applied to the Internet environment, we submit that a proper construction requires reducing vicarious liability from the broad sweep that it has achieved in those low-tech cases. Nonetheless, the case law creates the apprehension of an expansive interpretation of vicarious liability, even in the Internet environment. Indeed, Such case law as has arisen in the digital realm holds ISPs liable without any searching analysis of the differences between dance halls and telephone lines.

The first reported case to arise in this posture found that the mere fact that the defendant operated a bulletin board service (BBS) was all that was required to find infringement—"it does not matter that Defendant Frena may have been unaware of the copyright infringement." *Playboy Enterprises, Inc.* v. *Frena*, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993). The court held the BBS provider culpable of infringing the copyright owner's exclusive right to vend "any material embodiment of his work"; in particular, the court found that the defendant "supplied a product containing unauthorized copies of a copyrighted work." Id. at 1556. Unnoticed by the court, however, is that the "product" supplied by defendant consisted simply of a service; he did not sell or otherwise directly furnish any type of "material embodiment" of the copyrighted work. Thus, from the outset this field has been plagued by conceptual errors of the most basic sort.

Other cases have pursued providers of electronic bulletin boards specializing in video games, *Sega Enters. Ltd.* v. *Maphia, 857 F.Supp. 679 (N.D. Cal. 1994), of news groups that engage in "topical debate* * * * *on matters of public concern," Religious*

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[2] At the same time, the Administration's White Paper concedes that a scheme of reduced liability might reasonably result from "discussion and negotiation among the service providers, the content owners and the government." Id. at 123 ("We strongly encourage such actions in the interest of providing certainty and clarity in this emerging area of commerce.")

Technology Center v. *F.A.C.T. NET*, Inc., 901 F. Supp. 1519 (D. Colo. 1995), and of music available in a MIDI forum, *Frank Music Corp.* v. *CompuServe*, 51 Patent Trademark & Copyright Journal (BNA) 48 (Nov. 9, 1995). In perhaps the most closely watched in this line of cases, the judge refused to grant summary judgment on contributory infringement to an ISP that simply served as the point-of-entry for a small local BBS, one of whose 500 users was a vocal critic of the Church of Scientology. *Religious Technology Center* v. *Netcom online Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995). As applied throughout these cases, the doctrine of indirect liability creates the fear that ISPS will incur massive damages for acts of infringement committed by others. The result is a chilling effect hanging over the development of the entire medium.

Not only do the decided cases create a generalized fear of litigation against the ISPS of the world, but the process itself is already underway. In a high-profile campaign launched with press fanfare by the Software Publishers Association (SPA), some ISPS have been embroiled in litigation that is brought unless they submit to the SPA's self-styled "audit program." Among other onerous requirements, that program obligates the ISP to "agree to implement monitoring procedures" to scrutinize the billions of bits that flow over their networks, "report those procedures to the SPA," and "sign and return the ISP Code-of-Conduct [drafted by the SPA] within 5 days." Kuester & McClure, *SPA* v. *ISPs: Contributory Copyright Infringement in Cyberspace*, Intellectual Property Today 8, 9 (Feb. 1997). The cost of resisting the SPA'S unilateral demands is to find oneself targeted in the SPA's next litigation campaign, an especially intimidating prospect to the small, financially vulnerable ISP defendants chosen for the initial suits.

Nor is the SPA alone in threatening to use the courts in order to chill ISP conduct. For example, Dow Jones/Wall Street Journal and others threatened suit against an Internet news service for the simple practice of linking one World Wide Web site to another. The Information Industry Association is recent Statement on Service Provider Liability for Copyright Infringement on Online Networks likewise makes clear that association's position that ISPs must monitor the billions of bits that flow over their networks, or else bear the burden of establishing to a court for each act of alleged infringement why it cannot comply with that requirement.

ISPs cannot play the role of Internet copyright police, nor should they be expected to do so. The technology underlying the Internet does not allow an ISP, in most cases, to know the content of users' messages even if it wanted to (and was legally permitted) to pry. Most messages on the Internet are transmitted in tiny "packets" of information, for which only the sender and receiver have the information necessary to assemble those packets into a coherent message. To an ISP trying to police its users, the packets Would be indecipherable. Moreover, given the volume of information on the Internet, even if messages and postings could be read by the ISPs, it is impossible for them even to attempt to determine whether any particular message might contain copyrighted material and, if so, whether it is being used improperly. Given the nature of the Internet, the ISPs can do nothing, short of shutting down access to the Internet altogether, to prevent a very small percentage of their users from engaging in potentially illegal copying.

Under the present law, copyright owners have direct and effective remedies against those who directly commit acts of copyright infringement, including damages and injunctions to prevent future infringement. There is no sound reason why they should be permitted to sweep ISPs into such disputes simply because the ISPs are easy targets. We accordingly submit that corrective legislation to deal with this issue is necessary both to address the ISPs legitimate concerns about avoiding unjustified liability, as well as to ensure that the Internet and similar technologies can develop and grow for the benefit of all citizens.

RESPONSES OF ROBERT L. OAKLEY TO QUESTIONS FROM SENATOR HATCH

Question 1. Mr. Sherman made the point in his testimony that bookstores, record retailers, magazine publishers, TV broadcasters, and scores of others are all technically at risk of committing or contributing to copyright infringement by virtue of their day-to-day business operations, yet they continue to do business. Why can't service providers do likewise?

Answer 1. The fundamental difference between a bookstore or publisher and an Internet service provider (ISP) is that a bookstore or publisher receives its content from a relatively limited number of sources, while an ISP transmits content from literally millions of different sources. Thus, a bookstore or a publisher is in a far better position to protect itself "by dealing only with reputable wholesalers or agents" than an ISP.

Question 2. You are in agreement with Mr. Vradenburg and Mr. Neel on the principle of limiting copyright infringement liability for service providers, but would you accept the same legal regime as the ordinary service provider or would you argue for special treatment? If so, would you be specific about what kind of special needs libraries and universities would have?

Answer 2. Libraries and educational institutions should be treated somewhat differently from commercial service providers because of their traditional roles vis-á-vis the First Amendment and academic freedom, because of their unique relationship with their subscribers, and because they may provide the only Internet access for certain communities. Stated differently, the cost of error is greater with respect to a library or university than a commercial ISP.

For example, if an ISP shuts down a subscriber's web page notwithstanding the existence of an arguable "but by no means uncontestable" fair use defense, that subscriber can easily enroll with another ISP. An inner city high school student without his own computer, by contrast, might be able to access the Internet only via the computers at his school. If the school shuts down his web site despite his fair use defense, he has no ready alternative. Additionally, given the nature of the relationship between a school and its subscribers, a school's closing of a web site has far greater "Big Brother" implications than a similar action by a commercial ISP.

For this reason, libraries and educational institutions should not incur liability if they have a good faith belief that the allegedly infringing use is in fact fair. The libraries and educational institutions should not be forced to decide close calls against the user and in favor of the content provider. To be sure, one could argue that commercial ISPs likewise should not be forced to decide close calls against the user. However, because the cost of error is greater with the library or school, their case is more compelling.

Question 3. In your view, are there any circumstances in which "linking" would be at least contributory copyright infringement?

Answer 3. If the provider of the link has actual knowledge that the linked site contains infringing material, then a failure to remove the link might constitute contributory infringement.

RESPONSES TO ROBERT L. OAKLEY TO QUESTIONS FROM SENATOR LEAHY

Question 1. What would be the impact internationally of the United States adopting legislation limiting the liability or exempting from liability online service providers of copyright infringement?

Answer 1. If the Congress limited ISP liability, then other countries presumably would limit ISP liability in a similar manner. This would lead to rapid expansion of the Internet. Libraries and educational institutions in particular would increase their investment in providing Internet access services. This would greatly enhance the dissemination of information and knowledge. At the same time, it would open many new markets for content providers.

Question 2. Technology and market practices are evolving rapidly. Does legislation limiting the liability of online service providers or Internet access providers pose the risk of becoming obsolete in a short time, or freezing industry practices and preventing them from evolving as efficiently as possible?

Answer 2. On the contrary, limiting ISP liability will increase investment in Internet technology, which will stimulate its robust growth and development.

Question 3. Have any technical means been developed to protect copyright on the Internet by flagging either copyrighted material or infringing material?

(a) If so, are any of these systems capable of being implemented without the cooperation of the OSP/ISPs?

(b) If the liability of OSP and ISPs is limited for copyright infringement, what effect if any do you anticipate this would have on their willingness and/or incentive to cooperate in developing and implementing technical means to protect copyright online?

Answer 3. I am not aware if such technology currently exists at reasonable cost. However, ISPs will still have an incentive to cooperate with the content providers in deploying such technology. The more high grade copyrighted works the content community makes available in digital form, the greater the demand will be for Internet services.

Question 4. What are copyright owners doing today to prevent infringement of their creative works on the Internet?

Answer 4. Copyright owners search the Internet for pirate web sites. When they identify these sites, they endeavor to shut them down.

Question 5. What technological means, if any, are available today for service providers to identify infringing copies, without having to monitor the content of transmissions?

Answer 5. I am not aware of any.

Question 6. Have the courts applied the concept of fair use and other exemptions from liability in the copyright law in essentially the same manner in the online environment as they have in the print environment? If not, please cite the case or cases in which these concepts and exemptions have not been applied consistently in the online environment.

Answer 6. Thus far, there have been very few judicial decisions involving the application in the online environment of the fair use doctrine or other exemptions from liability. In *Religious Technology Center* v. *Lerma*, the court found the posting of Church of Scientology documents not to be a fair use. It is possible that a court would have found the infringer's likely conduct in the analog environment—the distribution of copies of the documents to a small group of interested people—to be non-infringing. The difference between the two environments is that in the online environment, when one posts a document, it could potentially be accessed by everyone in the world who surfs the Net, even though it might actually be accessed by relatively few. Accordingly, a court might be less likely to find the posting of a document to be a fair use.

Question 7. Current copyright laws exempt parties from liability in certain circumstances. For example, section 111 of Title 17, exempts "passive carriers" who retransmit broadcast signals containing copyrighted programming when the carrier "has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission" and whose relevant activities "consist solely of providing wires, cables or other communications channels for the use of others."

(a) Are OSPs and ISPs in a similar position as the "passive carriers" already granted an exemption under our copyright laws?

(b) What is your view of crafting similarly limited exemption specifically for OSPs or ISPs? Would that be enough and, if not, could you explain why?

Answer 7. ISPs are in a similar position as passive carriers with respect to some of their activities, such as the actual transmission of electronic messages. For these "mere conduit" activities, a passive carrier type exemption would be appropriate. By contrast, a passive carrier exception would not be sufficient to protect activities such as linking or maintaining web sites.

Question 8. Part of the negotiations on this issue that occurred in the House last year revolved around a code of conduct requiring that a service provider adhere to certain operating practices before it could avail itself of any limitations on copyright liability. This code of conduct would have required, among other things, that OSPs inform users of their obligations to respect copyright rights and terminate the access of known and repeat copyright infringers.

(a) Is this code of conduct being followed by online service providers?

(b) If so, what parts or all of it?

Answer 8. Such codes of conduct are employed by many libraries and educational institutions.

Question 9. What are your views of the "notice" and "take-down" procedures discussed in the negotiations lead by Congressman Goodlatte last year?

Answer 9. The notice and take down provisions of S. 1146 are superior to those discussed last year because they require a take down of only 10 days. This protects the due process rights of subscribers by requiring the content provider to go to court if it wants the material removed permanently. Another positive feature of S. 1146 is that library and educational institutions are construed not to have knowledge if they have a good faith belief that the allegedly infringing use was fair.

Question 10. Would a mandatory notice and take-down procedure violate the "no formality" requirement of the TRIPS agreement? Please explain why.

Answer 10. None.

Question 11. The recent court cases of *Microsoft* v. *Ticketmaster* and *TotalNews* have raised the issue of whether contributory copyright infringement liability applies to hyperlinking. In your view, does hyperlinking pose any risk of contributory copyright infringement liability if the site which is linked contains infringing material? If so, what effect, if any, do you think this will have on the freedom of users to hyperlink?

Answer 11. Unless a statutory exemption for linking is created, content providers will continue suing linkers. Until the extent of liability is clarified, these suits will have a chilling effect on linking, which of course, is one of the Internet's most useful features. Moreover, a poorly reasoned decision could cause linking to grind to a halt.

Question 12. In the physical world, if someone publishes a directory that references or cites to a work that infringes a copyright, my understanding is that the directory itself is not an infringing work nor is the author of the directory subject to liability for copyright infringement.

(a) Is my understanding correct?

(b) Should hyperlinking be treated any differently?

Answer 12. I believe that your understanding is correct, and I don't think hyperlinking should be treated any differently except as noted in my response to Chairman Hatch's third question. The danger is that a court will treat linking differently from a citation in a directory because the link actually takes you to the infringing work.

Question 13. Please describe generally what happens now when you company, or member companies, discover an electronic bulletin board service or an Internet Web site with pirated works?

Answer 13. It is my library's policy not to link to any site we know contains infringing work.

Question 14. What is the evidence showing that our current copyright laws are making the growth of the Internet suffer?

Answer 14. None

Question 15. Under what circumstances, if any, would an individual "browsing" the Web be subject to liability for copyright infringement?

Answer 15. When an individual browses the Web, a temporary copy is made in the random access memory of individual's computer. Depending on the software used, a temporary copy may also be made in a disk cache on that computer. Additionally, both temporary and cache copies may be made in the servers of the ISP connecting the reader to the work. A court could find any of these "copies" to be infringements. To be sure, there are theories why these copies would not infringe "fair use, implied license, absence of volition" but these are just theories. Legal certainty, like that provided by the amendments to 17 USC 117 proposed by S. 1146, is preferable to these theories.

Question 16. Several witnesses suggest that "innocent transmitters", or those who unwittingly distribute infringing material, should not be held liable for the copyright infringement initiated by others. Would this represent a significant change to the Copyright Act, which does not require culpable knowledge for imposition of liability, but instead provides for limited statutory damages or mitigation of damages?

Answer 16. From a theoretical point of view, any exemption would appear similar to a reduction of damages. However, an exemption would have many practical differences from a mere reduction in damages. Reduced damages could still be significant in dollar terms. Additionally, the defendant would have to pay its legal fees, and could be ordered to pay the plaintiff's attorney fees as well. These significant costs would be avoided by a clear exemption.

Question 17. Are the online service providers and Internet access providers seeking an exemption from direct liability for copyright infringement or just from contributory or vicarious liability?

Answer 17. We are seeking an exemption from direct liability as well as contributory and vicarious liability.

Question 18. If OSPs are exempt from the universal service surcharge levied against telecommunications services because they do more than common carriers, should they at the same time be granted a special exemption from copyright liability on the grounds that they act just like a common carrier?

Answer 18. None.

Question 19. Should there be any difference in copyright infringement liability for online services provided by commercial providers and by universities or libraries?

Answer 19. Yes. See my response to Chairman Hatch's second question.

Question 20. In the debate over whether Congress should create a new type of property protection for databases, opponents argue that those who seek legislation bear a heavy burden of proving why legislation is necessary. Do you think that those who seek legislation limiting OSP/ISP liability have met their burden of proof?

(a) How has that burden been met any differently in this case than with those who seek data base protection?

Answer 20. None.

Question 21. In 1993, the Ninth Circuit in *MAI* v. *Peak* decided that when a computer repair company turned on a computer to perform maintenance work, a copyright infringement occurred because the repair worker was not a licensed user of the software and caused a RAM copy of the software to be made. In the 104th Congress, the House—but not the Senate—passed a bill to respond to *MAI* v. *Peak*, and provide a limited exemption from copyright liability for copying a computer program "solely by virtue of the activation of a machine" in order to repair and maintain a computer. What is your view of such a limited exemption from copyright liability?

Answer 21. The language passed by the House was far too narrow to address the problem created by the *MAI* decision because it applied only to activation of the computer for hardware maintenance and repair. The language originally introduced by Congressman Knollenberg was superior, it made clear that 17 USC 117 applied to rightful possessors of a copy of a program, not just to owners of a copy. The amendments to 17 USC 117 proposed by S. 1146 also cure this problem.

Question 22. Nonprofit libraries are permitted under copyright laws to lend computer software. Borrowers are unable to use the borrowed program without downloading it into the random access memory (RAM) of their computers so that they are able to read or use it on their computer.

(a) Does the making of a temporary copy in RAM implicate any rights of the copyright holder and, if so, what are the risks of copyright infringement liability on the part of the borrower?

(b) Should the liability for copyright infringement for borrowers of computer software be clarified and, if so, what would you recommend?

Answer 22. The *MAI* decision certainly suggests that the borrower could be found liable for making a RAM copy unless it was permitted by the license under which the library obtained the software. As discussed in the previous answer, this problem could be corrected either by S. 1146 or Congressman Knollenberg's original proposal. The language actually passed by the House would not relieve this situation—clear proof of the inadequacy of the House language.

Question 23. Many Internet browsers cache "locally" by storing recently visited Web pages in the user computer's RAM to save time and burden on the Internet infrastructure from having to access the actual site. Caching also occurs on the server level, called "proxy" caching, so that OSPs, may store the most frequently requested sites on their own computer. When a user seeks a particular site, the online provider delivers a copy from its own computers' memory rather than from the Web site in question. Caching is considered essential to the successful functioning of the Internet.

(a) Does "caching" implicate any rights of the copyright holder and, if so, what are the risks of copyright infringement liability on the part of the computer user or online service provider?

(b) Should the liability for copyright infringement for the automatic "caching" engaged in by computers be clarified and, if so, what would you recommend?

Answer 23. As discussed in the response to question 15, a cache copy technically could be an infringing copy, even if the work is on the website with the authorization of the rights holder. The cache copy is *a fortiori* infringing if the work was uploaded onto the website without the rights holder's authorization. To be sure, the rights holder is unlikely to sue the ISP or the user for making a cache copy of a work on a legitimate website, and a court is even less likely to find liability for such a copy. Nonetheless, the copyright law is not well-served by leaving such matters to the whims of rights holders or the courts. Rather than rely on the courts to find a fair use, implied license, or absence of liability because of absence of violation (see *Netcom*), Congress should enact a clear exemption along the lines of S. 1146's amendment to Section 117.

Moreover, the risk of a rights holder suing an ISP for making a cache copy of a work on a pirate website is far larger, as is the risk that a judge would find the website operator liable. Accordingly, an exemption for ISPs is necessary. See Section 205 of S. 1146.

RESPONSE OF ROBERT L. OAKLEY TO A QUESTION FROM SENATOR THURMOND

Question 1. Are copyright infringement lawsuits being brought today against educational institutions and libraries for the online services that they provide, or are you just concerned about possible future liability?

Answer 1. None.

RESPONSE OF ROBERT L. OAKLEY TO A QUESTION FROM SENATOR GRASSLEY

Question 1. As a professor of law at Georgetown University, I would appreciate your response to a point Mr. Burton raises in his written testimony. Mr. Burton states that the "notice and take-down" approach is an invitation to the infringing party to destroy evidence. It seems that if the evidence is destroyed, then the infringing material is removed, which solves the problem. Do you believe the "notice and take-down" approach is workable?

Answer 1. You are correct that if the infringing party destroys evidence by removing the infringing material, the immediate problem is solved. Further, even if the infringing party attempts to destroy the evidence, chances are that the right holder made a copy of the pirate website when it was discovered, thereby preserving the evidence.

RESPONSE OF ROBERT L. OAKLEY TO A QUESTION FROM SENATOR FEINSTEIN

Question 1. You express concerns about disclosing the identity of suspected copyright violators. However, your testimony is not entirely clear to me. What is it that the copyright holders are asking you to do? Why exactly is this a problem for you to do?

Answer 1. When a content provider discovers material on a university's server which it believes to be infringing, it may contact the university to learn who uploaded the material. The university may not wish to disclose the individual's identity if it believes that the use is fair or otherwise non-infringing.

ADDITIONAL SUBMISSION FOR THE RECORD

PREPARED STATEMENT ON BEHALF OF THE GRAPHIC ARTISTS GUILD BY DANIEL ABRAHAM, VICE-PRESIDENT FOR PUBLIC AFFAIRS

The Graphic Artists Guild:

- Opposes limiting the copyright liability of online service providers as contrary to the fundamental Constitutional intent of copyright law to protect the rights of creators;
- Opposes limiting the copyright liability of online service providers because they are adequately protected under existing law;
- Opposes limiting the copyright liability of online service providers to the extent that they lay unilateral claim, by terms of service or otherwise, to copyright in works posted on or transmitted by online services;
- Supports holding online service providers and their subscribers accountable for the unactionable infringements enabled by the distribution of copyrighted works over online networks;
- Opposes limiting the copyright liability of online service providers to the extent that such limitation removes the incentive for online service providers to assist and participate in the dissemination of copyright education to the general public.

THE GRAPHIC ARTISTS GUILD

The Graphic Artists Guild promotes and protects the economic interests of its members. It is committed to improving conditions for all creators of graphic art and raising standards for the entire industry. The Guild is a union that embraces creators of graphic art at all levels of skill and expertise, producing work intended for presentation as originals or reproductions.

Graphic artists create a wide variety of intellectual property: company and product logos; illustrations for media and advertising; posters for political and sales campaigns; merchandise in the apparel, home decorative and stationery markets; and computer graphics which enhance and drive the digital marketplace.

Graphic artists have already suffered from infringements caused or facilitated by online service providers (see Appendix A), and are particularly vulnerable to further injury without relief if the online Copyright Liability Limitation Act passes.

THE PROPERTY RIGHTS OF CREATORS MUST BE SAFEGUARDED

The Constitutional authorization for copyright protection in Article I, §8 mandates safeguarding the rights of creators, for their own benefit and for the public interest. The Copyright Act is designed to protect the rights of creators in their work, and the rights of successor interests; licensees, purchasers and heirs. Any alteration of liability for infringement must be measured against this standard; unless the effect is the better protection of creators' rights, the alteration is contrary to the legislative history and intent of the copyright law.

This bill proposes to shield a specific class of business from copyright liability in the course of its distribution or transmission of copyrighted work. It does not address the threat which such distribution may pose to the protection of creators' rights. In failing to do so, such an alteration in liability threatens the constitutionally mandated incentives intended to foster the creative process.

ONLINE SERVICE PROVIDERS PROTECTED BY EXISTING LAW

online service providers are common carriers to the extent that they simply engage in secondary transmissions, providing their subscribers with an avenue for the interchange of their primary transmissions. Carriers engaging solely in the passive transmission of copyrighted work are exempt from liability under §111 (a)(3) of the copyright law; additional protection is unnecessary. Extending the scope of protection accorded passive transmissions is undesirable in light of the active attempts by online service providers to claim a copyright interest in the works transmitted (see infra).

online service providers currently shield themselves from liability for copyright infringement under existing law by means of warranty and indemnity. The contract between online service provider and subscriber, as expressed in the terms of service, warrants that those disseminating works have the right to do so, and will indemnify and hold harmless the online provider from any actions arising from breach of that warranty. (See Appendix, CompuServe Operating Rules: Copyrighted Material; Content and Uses of the Service; Indemnification; CompuServe Terms of Service #4.) This remedy is in keeping with the traditional reliance upon private remedies and civil suits for the settling of copyright claims. Continued reliance on these remedies and on existing statutory protection is preferable to enacting unnecessary special interest legislation, which will extend insulation from liability to the detriment of the integrity of copyright protection.

ONLINE SERVICE PROVIDERS CANNOT SIMULTANEOUSLY LAY UNILATERAL CLAIM TO A PROPERTY INTEREST IN TRANSMISSIONS AND ACHIEVE INSULATION FROM LIABILITY

Many online service providers do not restrict themselves to a passive role as regards their secondary transmissions. They assert a copyright interest in the works posted on their services, claiming that by virtue of providing the means of transmission they have created value-added compilations, with the non-exclusive right to publish, alter and use the material (see Appendix, excerpt from America Online Terms of Service; excerpt from CompuServe Terms of Service; What is a Compilation Copyright?; CompuServe Copyright). Not only do the online service providers pay no compensation for these rights, they compel paying subscribers to forfeit full control of their own property.

online service providers cannot simultaneously claim ownership and insulate themselves from liability. To the extent that they claim copyright in the works of creators and copyright holders that are posted or circulated on their networks, they forfeit common carrier status and the corresponding insulation from liability. The proposed act is flawed in that it would not prevent online service providers from asserting property rights in the works of others, but would insulate them from liability if they did not themselves post the work. Such a wholesale endorsement of unilateral copyright acquisition is wholly contrary to the protection of creators' rights which is fundamental to the copyright law; further statutory insulation from liability for transmitters who assert a property interest in the work transmitted is neither necessary nor desirable.

ACCOUNTABILITY FOR UNACTIONABLE INFRINGEMENTS ENABLED BY THE DISTRIBUTION OF COPYRIGHTED WORKS

online networks offer great opportunities for the distribution of works. But with this opportunity comes a corresponding peril to the works' protection and integrity. The new electronic environment by its very nature makes infringement easy. Technology has vastly increased the means whereby copyrights may be infringed, whether by alteration or dissemination, and the infringement rapidly distributed, without an equivalent increase in means to guard against or detect such infringements.

Not only electronically created work is at risk. Work done in traditional media may be easily taken and placed on an electronic network unbeknownst to the creator. The proposed limitation on liability for online service providers, while insulating the means of infringement from liability, offers no compensating means to protect the individual creator.

Despite the pervasiveness of online infringements, the difficulty of detecting them and identifying the originating infringer renders them largely unactionable. Yet infringing subscribers and the online service providers which furnish the engine for such infringements must be held accountable. A licensing system offers a solution to the threat posed to the copyright system by unactionable infringements. Such a system could include a licensing fee in the subscription collected by online service providers from their subscribers, which would be apportioned among rightsholders or their appropriate representatives. Similar systems already exist among cable television providers, which routinely assess and distribute a copyright fee from subscribers.

LIABILITY AS AN INCENTIVE TO PRIVATE SECTOR PARTICIPATION IN COPYRIGHT EDUCATION

The swiftly expanding group of online users is not generally knowledgeable about the need for intellectual property protection. The result is cavalier treatment of copyrighted material as freely available property. This is a threat to a major United States trade asset as well as to the private interests of rightsholders. If the U.S. is to preserve its constitutionally based policy of guarding incentives to individual creators, public education in the value of property rights in copyright must be expanded.

Potential liability in copyright infringement suits has given online service providers a financial interest in helping to remedy the lack of copyright education in the general populace. Copyright warnings and online copyright education sites are widely posted to insulate service providers from liability. Statutory insulation from liability will diminish, if not destroy, the incentive for service providers to create and provide such educational material causing the responsibility and expense of improving copyright education to fall much more heavily on the public sector. Such public policy is not merely short-sighted, but unjust in light of the claims made by online service providers on the copyrighted material posted by users.

CONCLUSIONS

Any alteration of liability for infringement must be measured against the Constitutional mandate to protect the rights of creators. This bill fails to meet that standard, it is not designed to protect the incentives intended to foster the creative process, but to shield a specific class of business from copyright liability. The Graphic Artists Guild believes the online Copyright Liability Limitation Act will benefit a single special interest over the public interest at the expense of individual creators.

Existing law adequately addresses the liability of online service providers. Service providers engaging in passive transmission of copyrighted work are common carriers exempt from liability under § 111(a)(3) of the copyright law. Extending the protection accorded passive transmissions is undesirable in light of online service provider claims to a copyright interest in transmitted works. online service providers currently shield themselves from infringement liability through warranty and indemnity, in keeping with the traditional reliance upon private remedies and civil suits for settling copyright disputes. Continued reliance upon these remedies and on existing statutory protection is preferable to enacting unnecessary special interest legislation.

online service providers asserting a copyright interest in the works posted on their services forfeit common carrier status and the corresponding insulation from liability. Service providers cannot simultaneously claim ownership and insulate themselves from liability. The proposed Act would not prevent online service providers from asserting property rights in the works of others, but would insulate them from liability if they did not themselves post the work. Such a wholesale endorsement of unilateral copyright acquisition is wholly contrary to the protection of creators' rights which is fundamental to the copyright law.

The proposed limitation of liability for online service providers insulates the means of infringement while offering no compensating means to protect the individual creator. Technology has increased the means whereby copyrights may be infringed, without an equivalent increase in means to guard against or detect such infringements. online infringements are largely unactionable, due to the difficulty of detecting them and identifying the originating infringer. Including a licensing fee in the subscriptions collected by online service providers would hold infringing subscribers and online service providers accountable for unactionable online infringements.

Copyrighted material is often treated as freely available property, due to the public's lack of understanding in copyright matters. This harms the private interests of rightsholders and threatens a major United States trade asset. Expanded copyright education is essential for continued U.S. leadership in the area of intellectual property. Potential liability has given online service providers a financial interest in improving this situation, but statutory insulation from liability will diminish, if not destroy, their incentive. The responsibility and expense of improving copyright education will fall upon the public sector.

The wider availability of information through electronic networks must not be achieved at the expense of creators' rights. The Graphic Artists Guild urges that the online Copyright Liability Limitation Act be defeated.

APPENDIX A

STATEMENT OF MICHAEL WHELAN

OPPOSING LIMITING COPYRIGHT INFRINGEMENT LIABILITY OF ONLINE AND INTERNET SERVICE PROVIDERS

Mr. Chairman, my name is Michael Whelan. I have been a professional illustrator since 1974. My works have appeared on numerous book covers, posters, album covers and other sources. I was awarded the prestigious HUGO award 13 times, the HOWARD award three times, and also received the Grumbacher Gold Medal, the Communication Arts Award for Excellence and the Society of Illustrators Gold Medal. I have been a member of the Graphic Artists Guild since 1978.

I am writing to oppose The online Copyright Liability Limitation Act as one who was personally injured by online service providers.

Early 1990 I learned that a large number of my works had been scanned, uploaded, and electronically distributed, without my knowledge or authorization, on to the bulletin board/forum areas of three major online information services. In most instances, authorship and copyright information regarding the uploaded works was absent or deliberately deleted. In some cases, other individuals claimed to be the creators of the works. That my name and copyright notice were cropped off the edges of my works indicated to me a willful attempt to destroy my status as creator of the works, but even if not, the resultant damages were the same. The Graphic Artists Guild helped me secure legal counsel, who pursued these infringements on my behalf.

Through discovery, I learned that my images were accessed and downloaded hundreds of times. In at least two cases, some of the images were downloaded onto reproducible media (CDs and floppy disks), and offered for sale by software vendors. In another instance, a software company distributed diskettes of my images as shareware to Macintosh computer dealers across the country so they could demonstrate the graphic capabilities of the Macintosh computer. My artwork had been digitally altered so that an advertising legend was splashed across the left half of the image. I was never compensated for any of those uses. Even worse, because my name and copyright notice were removed, my rights of ownership and attribution were abused.

My livelihood depends upon my ability to control the copyrights to my works. As a small business, I have successfully developed revenue streams from secondary uses of my images. Since a significant portion of my income depends upon the sale of limited edition print reproductions of my art, the financial damages I suffered from these infringements were enormous. How could I estimate the number of sales I lost to a public with free access to those same images that could be downloaded and printed on a subscriber's own color printer? As it was, the work and money I lost in wrangling with the online companies over my rights were considerable.

Were it not for the widespread popularity of my art and the concern of a loyal following who support my work, I would never have known of these copyright infringements. The vast amount of time and money needed to monitor the online companies is beyond my means, and beyond what most artists can afford to protect themselves. I could never have monitored all the online services and discovered the uploads on my own: I'm too busy earning my living as an artist!

When I took action against the three major online service providers, their characteristic response was, "But we assumed the images were public domain, because they carried no copyright notification." My position, which ultimately prevailed, was that the online service providers facilitated and encouraged the widespread distribution of my works by failing to manage their downloadable image banks and checking for attribution before accepting the images.

My settlement with these online service providers prevents me from disclosing their identities or the details of my compensation, but it doesn't prevent me from addressing this problem as one who was personally violated. There was no doubt they were liable for the injury I suffered and without the legal remedies available to me at the time, I could not have asserted my property rights. God help the artists who are unaware of how much their work has been violated, or who lack the resources in time and money required to keep track of the online service providers and to confront each violation as it occurs.

Our best defense is to rely on laws intended to protect individual creators. Without the protection of copyright law, I probably would never have been compensated for the infringements. Artists like me have a hard enough time defending our copyrights in an era when thieves proclaim "information wants to be free." I urge the committee not to weaken any weapons in our defense arsenal by limiting the liability of online providers, who have the means and resources to be held accountable.

APPENDIX B

EXCERPT FROM TERMS OF SERVICE, AMERICA ONLINE (AOL)

By submitting Content to any "public area" of AOL (*e.g.*, message boards, forums, the Member Directory), you grant AOL, Inc. and its affiliates the royalty-free, perpetual, irrevocable, non-exclusive right (including any moral rights) and license to use, reproduce, modify, adapt, publish, translate, create derivative works from, distribute, communicate to the public, perform and display the Content (in whole or in part) worldwide and/or to incorporate it in other works in any form, media or technology now known or later developed, for the full term of any rights that may exist in such Content. You also warrant that the holder of any Rights, including moral rights in such Content, has completely and effectively waived all such Rights and validly and irrevocably granted to you the right to grant the license stated above. You also permit any Member and authorized user to access, display, view, store and reproduce the Content for personal use. Subject to the foregoing, the owner of Content placed on AOL retains any and all Rights that may exist in such Content.

EXCERPT FROM TERMS OF SERVICE, COMPUSERVE

What is a Compilation Copyright?

CompuServe has copyrighted the contents of the CompuServe Information Service as a compilation copyright, just as many magazines and newspapers reserve such a copyright on the contents of their publications. This copyright is held in accordance with the 1976 Copyright Act of the United States.

A compilation copyright is granted when an organization collects information in a lawful way, adds value to it, and offers it to others. In this case, the CompuServe Information Service is a value-added product; CompuServe Incorporated has committed substantial financial resources to collecting more than 1700 areas on the service and offering them in an organized, structured way to a defined user base through a nationwide telecommunications network. The compilation copyright is intended to protect that substantial investment from unauthorized exploitation. This does not mean that CompuServe assumes ownership of individual programs and data bases provided to the system by members or information providers.

If I upload a Software Program I've Developed to CompuServe, Do I Still Retain Ownership of the Program?

Yes, you do. CompuServe's compilation copyright does NOT supersede individual ownership rights or copyrights to any of the material furnished to the Service by members or information providers.

For example, a member who creates a program and uploads it to a CompuServe forum data library STILL OWNS that program, and may upload it to other information services and bulletin board systems.

It should be noted, however, that CompuServe cannot grant any redistribution rights for materials copyrighted by the author, unless specifically authorized to do so, CompuServe does not own the material or the copyright. These rights must be obtained directly from the author.

What is CompuServe's Stance Toward Copyrighted, Public Domain, and Shareware Programs?

Each of these types of property have special characteristics, and deserves separate explanation:

Copyrighted Material

CompuServe does not allow copyrighted material to be placed on the CompuServe Information Service without the author's permission. Only the owner(s) or persons they specifically authorize may upload copyrighted material to the Service.

Any member may download copyrighted material for their own use. Any member may also non-commercially redistribute a copyrighted program with the expressed permission of the owner or authorized person. Permission must be specified in the document, on the Service, or must be obtained directly from the author. See menu choices 5, 6 and 7 for more information about redistribution guidelines.

Public Domain

Any member may upload public domain programs to the Service. Any member may download public domain programs for their own use or non-commercially redistribute a public domain program. See menu choices 5, 6, and 7 for more information about redistribution guidelines.

Shareware

Only the owner or an authorized person may upload shareware programs. Any member may download shareware programs for their own use, subject to the terms provided by the owner. Any member may non-commercially redistribute a shareware program subject to the provided terms explicitly displayed in the software itself, or with permission of the owner or authorized person. See menu choices 5, 6 and 7 for more information about redistribution guidelines.

As a CompuServe Member, Can I Download Public Domain Information and Shareware Programs for my own use from CompuServe Forum Data Libraries?

Yes, you can. Public domain information and shareware programs are uploaded to CompuServe data libraries by their authors for use by other CompuServe members.

May I Download Programs from CompuServe Forum Data Libraries and Share them with a Friend, or Upload them to Another Bulletin Board System?

In keeping with the spirit of the development of public domain information and shareware, it is not CompuServe's current policy to prevent casual redistribution of this type of information—this is low volume and low frequency use or redistribution of information where no commercialism is involved. This means that a member may download a file and share it with others for no commercial gain—either via a bulletin board service, diskette, or other means.

A member may not, however, download a large number of files for redistribution via any means, nor is it acceptable for a member to update another bulletin board regularly with files obtained from CompuServe.

It's important to note that CompuServe cannot grant redistribution rights for programs clearly copyrighted by the author, unless specifically authorized to do so. Such permission must be obtained directly from the author of the program.

May I Download and Resell a Program from a CompuServe Forum Data Library?

Commercial exploitation of material contained on the CompuServe Information Service is specifically prohibited by the CompuServe Service agreement, to which each member agrees before being permitted to access the Service. Therefore, members cannot lawfully download and redistribute public information or shareware programs for personal gain.

In addition, mass redistribution of public domain information or shareware is also prohibited. Mass distribution is defined as high frequency and/or high volume transfers.

What are the Penalties for Violating the Compilation Copyright or Service Agreement Provisions?

When a situation involving exploitation is brought to CompuServe's attention, we investigate and, if warranted, remind the violator of the Service Agreement Terms. If subsequent violations are reported, access to the CompuServe Information Service may be terminated for the violator and, in extreme cases, a letter is sent from our legal counsel asking that he or she cease and desist, or risk further legal action.

This is done as a positive step to protect the value and use of the material for CompuServe Information Service members, and to discourage unauthorized redistribution of that material.

CompuServe Information Service Operating Rules

The CompuServe Information Service (the "Service") consists of computing and information services and software, information and other content provided by CompuServe Incorporated ("CompuServe"). In addition, third parties provide information, software, and other content (collectively, "Third Party Content") which may be accessed over the Service. These Operating Rules are provided to make online information usage and communications a positive and secure experience for members.

Members agree during the online sign up procedure to the terms and conditions outlined in the Operating Rules.

Introduction

These Operating Rules are part of the terms of your Service Agreement with CompuServe, and you are bound by them. CompuServe may modify these rules at any time by publishing the modified rule(s) over the Service.

CompuServe Copyright

The entire contents of the Service are copyrighted as a collective work under the United States Copyright laws. The copying, redistribution, or publication of any part of the Service is prohibited, except as expressly provided below.

Each member who places information, software or other content, in the public areas of the Service grants CompuServe the right to edit, copy, publish, distribute, and translate such information, software or other content. Subject to this grant, each member who places information, software or other content on the Service retains any rights member may have in such information, software or other content.

Copyrighted Material

Copyrighted material must not be placed on the Service without the permission of the owner(s) or person(s) they specifically authorize. Only the owner(s) or such authorized person(s) may upload copyrighted material to the Service.

Members may download copyrighted material for their own use. Except as expressly provided by copyright law, copying, redistribution, or publication must be with the express permission of CompuServe and the owner(s) or such authorized person(s), if other than CompuServe. Permission must be specified in the document, on the Service, or must be obtained directly from CompuServe and the owner(s) or such authorized persons(s), if other than CompuServe. In any copying, redistribution, or publication of copyrighted material, any changes to or deletion of author attribution or copyright notice are prohibited.

Public Domain Material

Any member may upload public domain programs to the Service. Any member may download public domain programs for their own use or non-commercially redistribute a public domain program. Member assumes all risks regarding the determination of whether a program is in the public domain.

Content & Uses of the Service

Member agrees not to publish on or over the Service any information, software or other content which violates or infringes upon the rights of any others or which would be abusive, profane or offensive to an average person, or which, without the approval of CompuServe, contains any advertising or any solicitation to use goods or services. This paragraph, however, shall not be interpreted to restrict member from utilizing CompuServe Mail in the conduct of a legitimate business except that member may not, without the approval of CompuServe, send unsolicited advertising or promotional material.

Member agrees not to use the facilities and capabilities of the Service to conduct any business or activity or solicit the performance of any activity which is prohibited by law or to solicit members to become members of other competitive information services.

Editing and Deleting Content

CompuServe reserves the right in its sole discretion to edit or delete any information, software or other content appearing on the Service, regardless of whether it violates the standards for content.

Service Termination

CompuServe reserves the right in its sole discretion to suspend or terminate Service to any member at any time.

Indemnification

Member agrees to indemnify and hold CompuServe harmless from any claims and expenses, including reasonable attorney's fees, related to member's violation of the Service Agreement, including these rules or any information, software or other content placed on the Service by the member.

Standard Pricing Plan

Multiple members of the same household may share a single User ID Number. However, only one person is authorized to access the Service at any given time on one User ID Number.

COMPUSERVE ONLINE INFORMATION SERVICE AGREEMENT TERMS

1. The CompuServe Information Service (the "Service") consists of computing and information services and software, information and other content provided by CompuServe Incorporated ("CompuServe"). In addition, third parties provide information, software, and other content (collectively, "Third Party Content") which may be accessed over the Service. These terms and any Operating Rules published over the Service constitute the entire and only agreement (collectively, the "Agreement") between CompuServe and member (including its designated users) with respect to the Service and supersede all other communications and agreements with regard to the subject matter hereof.

2. Upon notice published over the Service, CompuServe may modify this agreement, the Operating Rules or prices, and may discontinue or revise any or all other aspects of the Service at its sole discretion and without prior notice.

3. Unless otherwise agreed, member's right to use the Service or to designate users is not transferable and is subject to any limits established by CompuServe, or by member's credit card company if billing is through a credit card.

4. Member agrees to indemnify CompuServe against liability for any and all use of member's account.

5. Member is responsible for and must provide all telephone and other equipment and services necessary to access the Service.

6. Member shall pay, in accordance with the provisions of the Billing Option selected by member, any registration or monthly fees, connect time charges, minimum charges and other charges incurred by member or its designated users at the rates in effect for the billing period in which those charges are incurred, including but not limited to charges for any purchases made through the Service and any surcharges incurred while using any supplemental networks or services other than the Service. Member shall pay all applicable taxes related to use of the Service by member or its designated users. Member shall be responsible for all use of the Service accessed through member's or its designated users' password(s). Billing detail is available for premium surcharged services. All other extended services are accumulated and billed in total on a per session basis.

7. Member expressly agrees that use of the service is at member's sole risk. Neither compuserve nor any of its information providers, licensors, employees, or agents warrant that the service will be uninterrupted or error free; nor does compuserve or any of its information providers, licensors, employees or agents make any warranty as to the results to be obtained from use of the service. The service is distributed on an "as is" basis without warranties of any kind, either express or implied, including but not limited to warranties of title or implied warranties of merchantability or fitness for a particular purpose, other than those warranties which are implied by and incapable of exclusion, restriction, or modification under the laws applicable to this agreement. Neither compuserve nor anyone else involved in creating, producing or delivering the service shall be liable for any direct, indirect, incidental, special or consequential damages arising out of use of the service or inability to use the service or out of any breach of any warranty. Member expressly acknowledges that the provision of this paragraph shall also apply to the third party content.

8. Except as expressly permitted in the Operating Rules, neither member nor its designated users may reproduce, redistribute, retransmit, publish or otherwise transfer, or commercially exploit, any information, software or other content which they receive through the Service.

9. The provisions of paragraphs 7 and 8 are for the benefit of CompuServe and its respective Information Providers, Licensors, Employees, and Agents; and each shall have the right to assert and enforce such provisions directly on its own behalf.

10. Subject to the terms of this Agreement, CompuServe grants to member a personal, non-exclusive, nonassignable and nontransferable license to use and display the CompuServe Information Manager software ("Software") on any machine(s) of which member is the primary user. Unauthorized copying of the Software, including software that has been modified, merged or included with the Software, or the written materials associated therewith is expressly forbidden. Member may not sublicense, assign or transfer this license or the Software. Any attempt to sublicense, assign or transfer any of the rights, duties or obligations under this license is void.

11. This agreement is, and shall be governed by and construed in accordance with the law of the State of Ohio applicable to agreements, made and performed in Ohio. Any cause of action of member or its designated users with respect to the Service must be instituted within 1 year after the claim or cause of action has arisen or be barred.

12. If Member's account is a qualified business account and approved by CompuServe for corporate billing, charges for the services provided under this Agreement will be accumulated and identified by User ID number and will normally be invoiced following the end of the month in which the service is provided. Terms of payment on all charges are net, ten (10) days in the currency in which billed. If any payment due hereunder is not made by the member within thirty (30) days after the invoice date, late charges of one and one-half percent (1½ percent) per month shall be due and payable with respect to such payment, and CompuServe may, in addition, at its sole discretion and without notice to the member, (a) suspend its performance under this agreement and the member's and its designated users' access to and use of the Service, or (b) terminate this agreement and member's and its designated users' access to and the use of the Service. For accounts not approved by CompuServe for corporate billing, member must provide payment by credit card or direct debit.

13. Notwithstanding any acknowledgment of a member purchase order by CompuServe, any provision or condition in any purchase order, voucher, or other memorandum of the member which is in any way inconsistent with, or adds to, the provisions of this agreement is null and void. Neither the course of conduct between

parties nor trade practice shall act to modify the provisions of this Agreement. If any provision of this Agreement is determined to be invalid, all other provisions shall remain in full force and effect. The provisions of paragraphs 7, 9, and 13 and all obligations of and restrictions on member and its designated users shall survive any termination of this Agreement.

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